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TREATIES, THEIR MAKING AND ENFORCEMENT

BY

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PREFACE

EVEN the frequency with which authorities are cited in the foot-notes, can but partially indicate my indebtedness to others. I desire here to acknowledge the most generous assistance. Although the portions of the dissertation relating to treaty-making in the United States and in France, had been prepared and presented before the Seminar at Columbia University prior to the appearance of *The Treaty-Making Power of the United States*, by Charles Henry Butler, and of *Les Traités internationaux devant les Chambres*, by Louis Michon, both have been of great service in the final revision. To Mr. Andrew H. Allen of the Department of State, for generous privileges given in the use of the manuscripts and publications deposited in the Bureau of Rolls and Library, and to my co-workers in the Department, for many courtesies extended, my thanks are especially due. To the members of the Faculty of Political Science in Columbia University, and more especially to Professor John Bassett Moore, at whose suggestion the work was undertaken, and whose advice throughout has been unceasing, I feel my chief indebtedness; and I take this occasion to express my high appreciation of the privilege of having enjoyed for a considerable period their counsel on the general principles of public law.

S. B. C.

WASHINGTON, D. C., *May, 1904.*

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INTRODUCTION

NAPOLEON III of France and Francis Joseph of Austria, each exercising of his own right sovereign powers, met and signed, July 11, 1859, the preliminary peace of Villafranca. A treaty thus concluded is perfected as an international compact immediately upon the signing. The Holy Alliance, which was, however, of a peculiarly personal nature, was likewise signed in person September 26, 1815, by the sovereigns of Russia, Prussia and Austria. The secret treaty of Tilsit of July 7, 1807, although not signed by the sovereigns themselves, embodied the results of the personal conference on the Niemen between the Czar Alexander and Napoleon I. For states, other than those in which the sovereign power is legally centered in a single person, to meet in their sovereign capacity, is quite inconceivable. The organization and powers of the agency through which such a state contracts are defined by its fundamental law, or constitution. Although in the ultra-democratic movement of 1793 in France, propositions were made to require the submission of treaties to the people, as sovereign, for approval, such a requirement is hardly to be contemplated. The delegation of authority to enter into treaties must of practical necessity be final, and an obligation constitutionally contracted is binding on the entire state. The determination of the agency in the different states intrusted with this power is the first step in a work on treaty-making.

It is a principle of public law that a sovereign state is restrained only by self-limitations or by such as result from a recognition of like powers in others. Accordingly the full power to enter into treaties is an attribute of every such state, as likewise a limitation on its exercise is a first mark of dependence. It does not follow that the power resides unrestricted in the regularly constituted treaty-making organ. A subject with which it assumes to deal may be intrusted by the state to another organ of government, and the consent of that organ may be necessary to the exercise of the power. In a federal system of government the subject may possibly be reserved to the several States or even to the people, but the power nevertheless exists, and the presumption always is, if there is no express limitation to the contrary, that the state intended that the power vested in the regularly constituted organ should extend to all the usual subjects of international regulation, and should be sufficient to meet any exigency arising from contact with other states.

The powers of the special agents (for it would seldom be practicable for the treaty-making organs of two states to meet in conference) appointed to conduct and conclude negotiations, are defined by special commissions and instructions. By the earlier writers on international law, living at a time when the theory of personal sovereignty generally obtained, and the negotiator was the immediate agent of the sovereign, the rule of the Roman law, that the principal is bound by the agent acting within his powers, was applied to treaty negotiations.[1] The advantages of intrusting full and general

[1] See Grotius, Bk. ii, ch. xi, sec. 12; Puffendorf, Bk. iii, ch. ix, sec. 2; Vattel, Bk. ii, ch. xii, sec. 156.

powers to the negotiators, and the importance of the trust have led recent writers quite generally to admit that, even if no reservation be made in the treaty or full powers, ratification, expressly or tacitly given, is essential to the validity of the treaty, and may for strong and substantial reasons be refused.[1] The qualification that the ratification may be refused, when the negotiator has acted within his powers, only for strong and substantial reasons, has application only in case his powers and instructions are given by the full treaty-making power of the state. For instance, in the United States a treaty is regularly negotiated on the authority of the President, while its ratification cannot be given without the authorization of the Senate. The plenipotentiary, commissioned and instructed by the President alone, acts not on the authority of the treaty-making power, but only on that of a separate branch of it. The act of the plenipotentiary is not the act of the state, for the President cannot thus delegate a power not intrusted to him. The negotiator can bind at most only his principal.

The maxim, "*qui cum alio contrahit vel est, vel debet esse non ignarus conditionis ejus,*" applies in the making of treaties. To know the powers of him with whom negotiations are conducted requires a knowledge not only of his special mandate and powers, the exhibition of which may always be demanded before the opening of the negotiations, but also of the fundamental law, or constitution, of the state which he professes to represent, as also of any limitations that may result from an incomplete sovereignty, as, for instance, in case of a semi-independent or permanently neutralized state. To the

[1] See to the contrary, Phillimore (2d ed.), vol. ii, p. 75; Klüber (2d ed.), p. 202. See also, Heffter, sec. 87.

validity of a treaty it is essential that the contracting parties have power over the subject-matter, that consent be reciprocally and regularly given, that the object of the treaty be possible and lawful according to principles of international law.

Consent is considered as freely given in the case of treaties under conditions of misrepresentation and duress that might render contracts voidable. Says Wharton, "If *suppressio veri* abrogated treaties to the extent it abrogates contracts, few treaties would stand."[1] In the negotiation of treaties the parties are supposed to be on the same footing, and with equal opportunities of ascertaining the facts.[2] Treaties of peace cannot be avoided by the unsuccessful nation on the ground that concessions have been extorted by threat of the further use of force. "It was," says Vattel, "her own free choice to prefer a certain and immediate loss, but of limited extent, to an evil of a more dreadful nature, which,

[1] *International Law Digest*, vol. ii, sec. 133.

[2] During the negotiations leading up to the Webster-Ashburton treaty, a map supposed to be very favorable to the British contention as to the northeastern boundary, was unearthed by Jared Sparks in his researches in Paris. It was shown by Mr. Webster to the commissioners from Maine, but not to Lord Ashburton. Subsequently it became public by being sent to the Senate. In the midst of the popular outcry that followed in England, an English diarist records (Greville, February 9, 1843), "At the same time our successive governments are much to blame in not having ransacked the archives at Paris, for they could certainly have done for a public object what Jared Sparks did for a private one, and a little trouble would have put them in possession of whatever that repository contained." Lord Ashburton, who had reason to complain, if such reason there were, in a communication of February 7, 1843, said, "The public are very busy with the question whether Webster was bound in honor to damage his own case by telling all. I have put this to the consciences of old diplomatists without getting a satisfactory answer. My own opinion is that in this respect no reproach can fairly be made." *Ibid.*, pp. 177, 180.

though yet at some distance, she had too great reason to apprehend."[1] Phillimore draws a possible analogy in this respect to a private contract entered into to avoid, or to stop litigation, which, although the party was induced to enter into it through the apprehension of delay, expense, and the uncertain event of a lawsuit, is nevertheless binding.[2] Force or intimidation applied, however, to the person of the negotiator, in whom is vested the full and final treaty-making power of the state—and unless the power were thus fully and finally vested, the right of ratification would render the use of force futile —vitiates the agreement. Such a case is hardly to be imagined at the present time, and the paucity of recent instances is attested by the uniformity with which writers refer to the concessions extorted from Ferdinand VII at Bayonne.

The importance of the subject-matter, the frequent changes in the *personnel* of the contracting organs, the inability to confirm by witness the utterances of a state, render it more necessary that contracts between nations should be carefully expressed in writing than contracts between individuals. While no particular form is essential to the validity of a treaty, it is the practice in formal treaties to make out and sign under seal as many counterparts as there are parties, one counterpart to be retained by each. In case of two parties only, which have no common language, each counterpart is usually made out in the languages of both. The texts sometimes appear on separate sheets but more often in parallel columns or on opposite pages, the text in the language of the nation by which the counterpart is to be retained occupying the left hand column or page.

[1] Bk. iv, ch. iv, sec. 37. [2] Vol. ii, pp. 71, 72.

Likewise with the development of the principle of the equality of states before the law, precedence in the enumeration of the negotiators in the preamble and in the signatures is given in the counterpart to the state which retains. Otherwise the two instruments are identical. In case of several parties having various languages, the instrument often appears in only one language, customarily in Europe, the French. The same precedence is given in the retained counterpart, the order of the other countries being alphabetical or determined by lot. The ratification is not only attached to the instrument retained, but, for the assurance of the other contracting party or parties, is also attached to an exact copy of the retained instrument, which is exchanged for a similar copy from the other party, or in case of several parties is deposited in such place as is designated by the treaty. Each state, in case of two parties only, has then not only its own counterpart with its ratification attached, but a copy of the counterpart retained by the other party with the latter's ratification attached. A protocol signed by the plenipotentiaries by whom the exchange is effected records the act.

As there is no common court by which compacts between states can be enforced, they derive their obligation from the plighted faith. To insure their execution and observance, it was customary at one time to give to important treaties a special confirmation by oath or guaranty, or to deliver hostages as a pledge.[1] Although

[1] See for instances, Phillimore, vol. ii, p. 77 *et seq.*, and Rivier, vol. ii, p. 94 *et seq.* In a treaty of amity and commerce between Henry VII of England and Philip, Archduke of Austria, signed Feb. 24, 1495, one archbishop, two bishops, one marquis, five earls, one viscount, one prior, and the mayors and aldermen of seventeen of the principal cities of England, were joined as sureties on the part of the king of England. *A General Collection of Treatys* (2d ed. London, 1732), vol. ii, p. 21.

as between civilized nations of the first rank the latter expedient terminated with the treaty of Aix la Chapelle of 1748, it has been resorted to in treaties with people of a less degree of civilization. For instance, the United States has accepted hostages in concluding treaties with Indian tribes. Likewise territory may be held as security for faithful performance. Such was the case with the treaties of peace of May 10, 1871, between France and Germany, and of April 17, 1895, between China and Japan. In the desire of each nation to have its word stand unimpeached, is found, however, at present the chief sanction of treaties. As Vattel says, "He who violates his treaties, violates at the same time the law of nations; for he disregards the faith of treaties—that faith which the law of nations declares sacred; and so far as depends on him he renders it vain and ineffectual. Doubly guilty, he does an injury to his ally, he does an injury to all nations, and inflicts a wound on the great society of mankind."[1]

[1] Vattel, Bk. ii, ch. xv, sec. 221.

PART I

THE UNITED STATES

I. Prior to the Articles of Confederation

In the debate in the Continental Congress, February 16, 1776, on the question of opening our ports to foreign commerce, a treaty with a foreign power was suggested. To this suggestion, George Wythe of Virginia replied that we might invite foreign powers to make treaties of commerce with us; but that before this step was taken it should be considered in what character we should treat. "As subjects of Great Britain? as rebels? No, we must declare ourselves a free people." He then moved that the colonies had a right to enter into alliances with foreign powers. An objector observed, "This is independence."[1] The expediency of entering into treaties was at various times considered in Congress, but to many there seemed to be an impropriety in seeking acknowledgment from a foreign power until we had "acknowledged ourselves" and taken a stand as an independent nation.[2] In reply to those who, in the memorable debate on June 8 and 10, advocated the expediency of fixing terms of treaties to be proposed to foreign powers before declaring independence, it was urged "That

[1] Bancroft, *History of the United States* (author's last revision), vol. iv, p. 335. *Works of John Adams* (C. F. Adams ed.), vol. ii, p. 485.

[2] *Ibid.*, vol. ii, p. 503.

a declaration of independence alone could render it consistent with European delicacy for European powers to treat with us."[1] Franklin in writing, Dec. 19, 1775, at the request of the Committee of Secret Correspondence, to C. W. F. Dumas, a faithful and too long neglected friend to the American cause, asked him to sound the ambassadors of the European states at The Hague on their willingness to treat with us for the benefits of our commerce if, as it seemed likely to happen, "we should be obliged to break off all connection with Great Britain and declare ourselves an independent people."[2] So also in the instructions of March 3, 1776, Silas Deane was authorized to enquire of Count de Vergennes "whether if the Colonies should be forced to form themselves into an independent state, France would probably acknowledge them as such, receive their ambassadors, enter into any treaty or alliance with them, for commerce or defense or both? If so, on what principal conditions?"[3]

On June 11, 1776, the day on which the committee was chosen to draft a declaration of independence, resolutions were passed providing for two committees—one to prepare a form of confederation, the other to prepare a plan of treaties to be proposed to foreign powers. On the following day the two committees were chosen—John Dickinson, Benj. Franklin, John Adams, Benj. Harrison and Robert Morris on the latter.[4] Closely associated then in origin are these three features of our national life—independence, union, and treaty-making.

[1] Jefferson ascribes without distinction the argument to "J. Adams, Lee, Wythe, and others." *Writings* (Ford ed.), vol. i, pp. 21, 23.

[2] Wharton's *Diplomatic Correspondence of the American Revolution*, vol. ii, p. 65.

[3] *Ibid.*, p. 79.

[4] *Journals of Congress*, (1800 ed.) vol. ii, pp. 197, 198.

The committee reported, July 18, a draft, in the handwriting of John Adams, detailing the articles of a treaty to be proposed to the King of France. While it would not be contended that a declaration of independence was an absolute prerequisite to overtures to foreign powers for the negotiation of treaties, yet the conclusion of a treaty on the basis of Adams's draft would naturally have presupposed such a declaration. The draft was not in the nature of a petition of a subject, dependent people struggling for independent existence; but rather, an offer of a nation already free and independent. That the conclusion of such a treaty might bring on war between France and Great Britian was thought probable; and it was proposed to stipulate that in such an event the United States should not assist the latter. As an expression of the natural interest of the new nation in the future disposition of territory on the North American continent, it was proposed further to stipulate that the United States should have "the sole, exclusive, undivided, and perpetual possession" of all parts of the continent or islands closely adjacent, then or lately under the jurisdiction of Great Britain, as soon as they might be joined to the United States. Not only was the French king to grant reciprocal privileges in commerce, but he was to bind himself that under no pretense would he ever take possession of any of the territory above referred to.[1] On August 27 the plan was discussed in the committee of the whole, slightly amended, and again referred to the committee, to which were now added R. H. Lee and James Wilson, with authority to prepare instructions to accompany it.[2] The instructions were

[1] *MSS. Continental Congress Papers*, vol. xlvii, p. 129.

[2] *Journals of Congress*, vol. ii, p. 311.

reported September 10, and, with the project, were adopted by Congress September 17.[1] As adopted the project differed little from the original draft. An article had been inserted providing that his Most Christian Majesty should retain the same fishing and other rights on the banks of Newfoundland to which he was entitled by virtue of the treaty of Paris. An article requiring additional pledges on his part against any claim to portions of the continent, or adjacent islands, then or lately under the jurisdiction of Great Britain, for assistance in reducing them, was stricken out. The instructions designated articles to be insisted upon, and those that might be waived, thus slightly compromising the independent character of the original plan, and exposing an ultimate object. "It is highly probable," as one instruction reads, "that France means not to let the United States sink in the present contest. But as the difficulty of obtaining true accounts of our condition may cause an opinion to be entertained that we are able to support the war on our own strength and resources longer than, in fact, we can do, it will be proper for you to press for the immediate and explicit declaration of France in our favor, upon a suggestion that a reunion with Great Britian may be the consequence of delay."[2] This idea of an alliance was even more clearly expressed in a clause inserted in the draft of the instructions, but later stricken out, which provided that if the Court of France could not be prevailed upon to engage in the war with Great Britain, the commissioners might agree, as a further inducement, that the United States would

[1] *Secret Journals*, vol. ii, p. 6.

[2] The main draft of the instructions is in the handwriting of James Wilson. *MSS. Cont. Cong. Papers*, vol. xlvii, p. 169.

not make peace with Great Britian until France had gained possession of certain islands in the West Indies lately ceded to Great Britain.

On September 26 Benjamin Franklin, Silas Deane and Thomas Jefferson were chosen commissioners to negotiate the treaty. Jefferson, being unable to serve, was, on October 22, replaced by Arthur Lee. The purpose of the mission, as expressed in the letters of credence, which had been prepared by a special committee, and adopted by Congress September 28, was to secure the beneficial results of a trade upon equal terms between the subjects of the two nations. Full power was given "to communicate, treat and conclude," the delegates of the several States in Congress assembled promising in good faith to ratify whatsoever the commissioners should transact in the premises.[1] On December 23 the commissioners addressed a communication to Vergennes requesting an audience, and in no instance is the dignity of the mission better sustained. "We beg leave," so it reads, "to acquaint your Excellency that we are appointed and fully empowered by the Congress of the United States of America to propose and negotiate a treaty of amity and commerce between France and the said States. The just and generous treatment their trading ships have received, by a free admission into the ports of this kingdom, with other considerations of respect, has induced the Congress to make this offer to France. We request an audience of your Excellency wherein we may have an opportunity of presenting our credentials, and we flatter ourselves that the propositions we are instructed to make are such as will not be found unacceptable."[2] It was

[1] *Secret Journals*, vol. ii, pp. 31, 32, 35.

[2] *Foreign Relations of the United States, 1877*, p. 155.

not until February 6, 1778, that success attended their efforts. On that date a treaty of amity and commerce and a treaty of alliance, together with a separate and secret article, were signed. The treaty of commerce was the first to be concluded,[1] and conformed to the project with what might seem to be the necessary and implied reciprocal concessions. An alliance had from the first been associated with the proposed treaty. The Committee of Secret Correspondence, in notifying Silas Deane, had spoken of the plan of a treaty of commerce and alliance.[2] Subsequent instructions had been more explicit. Those adopted by Congress December 30, 1776, had authorized the negotiation of an article according to which the forces of the two nations should be joined in reducing British possessions.[3] But in the nature and permanent character of the alliance as entered into, the commissioners without doubt exceeded their instructions.

The treaties were received by Congress late Saturday, May 2, and were unanimously ratified the following Monday.[4] In Article XI of the treaty of commerce, corresponding to Article XIII of the project, it was stipulated that no duty should ever be imposed on the exportation of molasses by the subjects of the United States from islands of America which were or should be under French jurisdiction. Article XII, which was not specifically authorized in the project, provided in compensation for this concession that no duties should ever be laid on the exportation of any kind of merchandise which French subjects might take from the United States and

[1] In the opening of the treaty of alliance is found this clause: "having this day concluded a treaty of amity and commerce."

[2] Wharton's *Dip. Cor. Am. Rev.*, vol. ii, pp. 162, 181.

[3] *Secret Journals*, vol. ii, p. 39.

[4] *Journals of Congress*, vol. iv, p. 184.

possessions, present and future, for the use of the islands furnishing the molasses. The commissioners at Paris had seriously differed as to the relative value of the two articles. To Congress the concessions of the two articles seemed unequal, and on the day following the ratification, a resolution was adopted authorizing the commissioners to inform the French government that, although Congress had readily ratified the treaties, it was desirous that Articles XI and XII should be expunged.[1] The ratifications of the treaty as signed were exchanged July 17,[2] but subsequently, in accordance with the expressed wish of Congress, the two articles were rescinded by counter declarations.[3]

During this period other commissioners were sent out to negotiate with different European states: May 7, 1777, Ralph Izard to negotiate with the Grand Duke of Tuscany;[4] May 9, William Lee, with the Courts of Vienna and Berlin;[5] September 27, 1779, John Jay, with Spain;[6] September 27, John Adams, with Great Britain;[7] November 1, 1779, Henry Laurens, with the Netherlands;[8] December 19, 1780, Francis Dana, with Russia,[9] and December 29, 1780, John Adams, with the Netherlands.[10] The commissions, with the exception of those issued to William Lee and Ralph Izard under date of July 1, 1777, and to Francis Dana under date of December 19, 1780,[11] gave full powers to "confer, treat, agree and conclude," Congress promising to ratify whatever should be transacted in the premises.[12] The commission issued to

[1] *Journals of Congress*, vol. iv, p. 185.
[2] Wharton's *Dip. Cor. Am. Rev.*, vol. ii, p. 650.
[3] *Ibid.*, vol. i, p. 344. [4] *Secret Journals*, vol. ii, p. 44.
[5] *Ibid.*, p. 45. [6] *Ibid.*, p. 256. [7] *Ibid.*, p. 257.
[8] *Ibid.*, p. 286. [9] *Ibid.*, p. 357. [10] *Ibid.*, p. 376.
[11] *Ibid.*, pp. 49, 358. [12] *Ibid.*, pp. 258, 264, 276, 290.

Francis Dana contained a clause specifically requiring the transmission to Congress for final ratification.[1] No treaty resulted during this period from these missions. The instructions and the form and authority of the commissions were, before the opening of the formal negotiations, approved by Congress, and the first project formed the basis of the instructions so far as they were confined to amity and commerce.

The committee through which the correspondence was chiefly conducted had originally, November 29, 1775, been formed for the sole purpose of corresponding with friends of the colonies in Great Britain, Ireland and other parts of the world, and was known as the Committee of Secret Correspondence. On April 17, 1777, the name was changed to the "Committee of Foreign Affairs." The inadequacy of this unorganized and changing committee of Congress resulted in the establishment, January 10, 1781, of a permanent department of foreign affairs, the occupant of which was to be styled "Secretary for Foreign Affairs."[2]

II. Under the Articles of Confederation

1. The Negotiation

Of the three committees appointed in the early part of June, 1776—the committee to prepare a draft of a Declaration of Independence had reported June 28, and the Declaration had been adopted July 4; the committee to prepare a plan of treaties had reported July 18, and a

[1] See Livingston to Dana, May 1, 1783, Wharton's *Dip. Cor. Am. Rev.*, vol. vi, p. 403; *Secret Journals*, vol. iii, p. 353.

[2] *Secret Journals*, vol. ii, pp. 5, 479, 581. See defects of the committee, Wharton's *Dip. Cor. Am. Rev.*, vol. iii, p. 288; vol. iv, pp. 105, 107.

plan had been adopted September 17; the committee to prepare a form of union had reported July 12, but the plan was not adopted until November 15, 1777, and did not become binding until March 1, 1781, with the ratification of the Maryland delegates. The draft of the Articles of Confederation in John Dickinson's hand-writing reported July 12, and the Articles as finally adopted, agree essentially in the provisions relating directly to treaty-making. In both not only is the sole and exclusive right and power to make treaties vested in Congress, but the States without the consent of Congress are specifically prohibited from entering into any treaty with a foreign prince or state, or any treaty, confederation or alliance whatever with another State of the Confederation. No treaty shall be made by Congress unless nine States "assent to the same."[1] Congress is expressly prohibited from entering into any treaty whereby the States shall be restrained from imposing such duties and imposts on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods whatsoever.[2] On the other hand, the States are expressly prohibited from laying imposts or duties which may interfere with any stipulations in treaties entered into with any foreign power in pursuance of any treaties already proposed by Congress to the courts of France and Spain.[3] This specific restriction

[1] In Dickinson's draft, Articles IV, V, XVIII. In the final form, Articles VI, IX. Dickinson had placed in the margin of his draft the query whether so large a majority was necessary in concluding a treaty of peace. A clause was inserted excepting treaties of peace from the required assent of nine States and appeared in subsequent copies but not in the final Articles as adopted. *MSS. Cont. Cong. Papers*, vol. xlvii, p. 17.

[2] Art. IX.

[3] Art. VI.

on the States might, if considered separately, be construed as indicating that they retained the right to interfere, by the imposition of duties, with treaty stipulations not conforming to those already proposed to France and Spain; but it should be read with the preceding specific prohibition on Congress from which, by a similar construction, it might be inferred that the power to deal by treaty with matters of commerce belonged to Congress so far as not expressly denied.

In the re-organization of the department of foreign affairs on February 22, 1782, it was provided that all communications with diplomatic officers and consular agents of the United States in foreign countries, or with ministers of foreign powers, should be conducted through the Secretary to the United States for the department of foreign affairs; and that all instructions, communications, letters of credence, plans of treaties and other acts of Congress relative to foreign affairs should, when the substance of them had been previously agreed to in Congress, "be reduced to form in the office of foreign affairs, and submitted to the opinion of Congress; and when passed, signed and attested, sent to the office of foreign affairs to be countersigned and forwarded."[1] The absolute dependence of the Secretary upon authority from Congress is illustrated in the negotiations at our own seat of government with Don Diego de Gardoqui, the Spanish chargé d'affaires, relative to boundaries, the navigation of the Mississippi and commerce. To enable

[1] *Secret Journals*, vol. iii, pp. 93, 96. During this period two different secretaries served—R. R. Livingston, elected August 10, 1781, but not assuming the duties of the office until October 20 following; and John Jay, elected May 7, 1784, assuming duties December 21. From the resignation of Livingston in June, 1783, until December, 1784, the office was vacant. *Treaties and Conventions* (1889 ed.), p. 1230.

the Secretary, John Jay, to conduct the negotiations, a special commission was issued July 21, 1785. In the resolution passed by Congress, July 20, authorizing the negotiations, it was provided that previous to the making of any proposition or to the agreeing upon any article, compact or convention, the Secretary should communicate to Congress the proposition to be made or received.[1] The inconvenience which would necessarily result, led the Secretary to observe, in a communication to Congress on August 15, that while it was usual to instruct ministers on great points to be agitated, he was inclined to think it was very seldom thought necessary to leave nothing at all to their discretion. While the instruction restraining him from agreeing to any article without the previous approbation of Congress seemed to him prudent and wise, to be further obliged to communicate, for the approval of Congress, every proposition which it might be deemed expedient to make to the Spanish negotiator in the conferences, was exceedingly embarrassing.[2] The instructions of August 25 accordingly removed this embarrassment, but still required that no treaty should be signed until approved by Congress.[3]

During the negotiations, the question of the power of the delegates of a majority of the States to repeal instructions was raised. In the instructions of August 25, 1785, nine States concurring, the Secretary was required "particularly" to stipulate for the right of the United States to its territorial bounds and the free navigation of the Mississippi from the source to the ocean, as established in the treaty of peace. On August 29, 1786, Congress

[1] *Secret Journals*, vol. iii, p. 570.

[2] *Diplomatic Correspondence 1783–9* (1833 ed.), vol. vi, p. 100.

[3] *Ibid.*, p. 102.

voted, seven States in the affirmative, to repeal this instruction. The view of the minority on the constitutional question involved was expressed by resolutions, moved August 31 by Charles Pinckney, in which it was declared, "If a treaty entered into in pursuance of instructions be not ratified, by the law of nations it is *causa belli*. If only seven States repeal the said last-recited clause of Mr. Jay's instructions, and he thereupon proceeds to enter into a treaty upon different principles than those under which he was formerly authorized by nine States, the said treaty cannot be considered as formed under instructions constitutionally sanctioned by the authority required under the confederation; nor are the United States, under the laws or usages of nations, bound to ratify and confirm the same."[1] The effect of the vote of repeal was never tested, as the negotiations were, September 16, 1788, postponed by Congress for the future government. It may be observed, in support of the contention advanced by the minority, that the negotiator, with the instructions thus amended, would act as agent not for the treaty-making power, but for a part of it only. The revocation by a vote of seven States of the commission of 1779 to John Adams, empowering him to negotiate with Great Britain, was entirely different.[2] The termination of a mission and the modifying of instructions under which the treaty may be negotiated are acts quite distinct.

In the various negotiations conducted at Paris during

[1] *Secret Journals*, vol. iv, p. 125. The debates that followed were sectional and unfortunate. John Brown, a faithful representative in Congress of the Kentucky district, wrote to Jefferson August 10, 1788: "Indeed the ill-advised attempt to cede the navigation of that River has laid the foundation for the dismemberment of the American Empire." *MSS. Jefferson Papers*, series 2, vol. iv, no. 22.

[2] *Writings of Madison* (Hunt ed.), vol. ii, p. 38.

this period, Congress was led to recognize the necessity of intrusting more to the discretion of the negotiators. In the instructions of October 29, 1783, authorizing negotiations with the commercial powers of Europe, provision, however, was at first inserted that treaties should not be "finally conclusive until they had been transmitted to the United States in Congress assembled, for their examination and final direction,"[1] which was construed by the commissioners to require their transmission to Congress before the signing.[2] This was modified by the supplementary instructions of May 7, 1784, and the commissions issued May 11, according to which Congress reserved only a final ratification.[3]

There were signed, and subsequently ratified by Congress during this period, besides the two agreements of July 16, 1782, and February 25, 1783, with France relative to loans: October 8, 1782, a treaty of commerce and a separate article relative to recaptured vessels with the Netherlands; April 3, 1783, a treaty of commerce, together with separate articles with Sweden; November 30, 1782, provisional articles of peace, and September 3, 1783, a definitive treaty of peace with a separate and secret article with Great Britain; July 9, 28, August 5, and September 10, 1785, a treaty of amity and commerce with Prussia; and a treaty with Morocco ratified by Congress July 28, 1787. Various fruitless negotiations were entered into. At our own seat of government the Chevalier de la Luzerne, the minister from the court of France, on July 27, 1781, transmitted to Congress for consideration a memorial accompanied by a proposed consular

[1] *Secret Journals*, vol. iii, p. 413.

[2] *Works of John Adams*, vol. ix, p. 521. *Dip. Cor. 1783–9*, vol. ii, p. 134.

[3] *Secret Journals*, vol. iii, pp. 489, 499.

convention.[1] The draft was referred by Congress to a special committee with authority to confer with the French minister.[2] So also the French chargé d'affaires, on November 28, 1785, transmitted to Mr. Jay for submission to Congress a plan of a postal convention.[3] The project anticipated more than fifty years our first treaty in this respect. Although Congress had in the resolutions of May 7, 1784, declared it advantageous to conclude "treaties with Russia, the court of Vienna, Prussia, Denmark, Saxony, Hamburg, Great Britain, Spain, Portugal, Genoa, Tuscany, Rome, Naples, Venice, Sardinia and the Ottoman Porte,"[4] with Prussia alone of these does a treaty record the efforts of the Paris commissioners and the advanced principles of international law upon which their instructions were based.[5] For the signing of this treaty it was impossible for the commissioners to meet at one place; accordingly Franklin signed at Passy July 9, Jefferson at Paris July 28, Adams at London August 5, and F. G. de Thulemeier, the Prussian negotiator, at The Hague September 10, 1785. Franklin, who was about to depart for America, signed the instrument before the insertion of the French text. Jay, to whom Congress referred the treaty, expressed the opinion that the duration of the treaty, ten years, would be from the date of the last signature.[6] The treaty with Morocco, negotiated on the part of the commissioners by Thomas Barclay, was signed and approved by Jefferson, January 1, and by Adams, January 25, 1787.

[1] *Secret Journals*, vol. iii, p. 5. [2] *Ibid.*, pp. 20, 23.

[3] *Dip. Cor. 1783–9*, vol. i, p. 255. [4] *Secret Journals*, vol. iii, p. 484.

[5] Negotiations were commenced with nearly every power of Europe and in some cases nearly consummated. *Dip. Cor.*, vol. ii, pp, 239, 255, 264, 281, 299, 308, 323, 330, 335, 386.

[6] *Ibid.*, pp. 329, 330, 335.

2. THE RATIFICATION

Congress, in which were combined the negotiating and ratifying functions, recognized an obligation to ratify what it had authorized. A consular convention with France, signed at Paris July 29, 1784, having met with some opposition was referred to Jay, the Secretary for Foreign Affairs, for examination. Proceeding upon the principle that a refusal to ratify could be warranted only on the grounds "either that their ministers have exceeded the powers delegated by their commission or departed from the instructions given them," the Secretary made a careful comparison of the convention with the project and the instructions adopted by Congress, nine States concurring, January 25, 1782. He concluded that it departed not merely from the wording and arrangement, but from the subject-matter of the project, and advised against its ratification in the present form. He added, however, that although such conventions were contrary to the true policy of the United States, yet since Congress had proceeded so far in the present instance, assurance should be given to the king of France of the readiness of Congress to ratify a convention made in conformity to the project, provided an article be added to limit its duration. Congress, following the recommendation, withheld ratification and at the same time instructed Jefferson to make the explanations and to secure the modifications.[1]

In examining the treaty concluded with Sweden some verbal changes seemed essential. The national title used in the treaty was the "United States of North America" whereas the title as defined in the Articles of Confedera-

[1] *Dip. Cor.*, vol. i, pp. 305, 312, 322. *Secret Journals*, vol. iii, p. 66; vol. iv, p. 132.

tion was the "United States of America"; the expression "the counties of New Castle, Kent and Sussex on the Delaware" was employed, although the title of the State was now Delaware. Congress, however, ratified the treaty as signed, but authorized Franklin to secure the corrections.[1]

In the ratification both of the provisional articles, and of the definitive treaty of peace, questions were raised. The provisional articles were to be inserted in, and to constitute the treaty of peace proposed to be concluded, which treaty should not be "concluded" until terms of peace had been agreed upon between Great Britain and France. They contained no provision for ratification; the only reference to the subject being found in Article VI, in which it was stipulated that immediately on the ratification of the treaty in America, those confined for the part they had taken in the war should be released and the prosecutions discontinued. A letter from Franklin of January 21, notifying Congress that provisional articles of peace had been signed January 20, 1783, by Great Britain on the one hand, and France and Spain respectively on the other, was received April 10. A report of the Secretary for Foreign Affairs, advising the ratification of the provisional articles, was referred to a committee of which Madison and Hamilton were members. The committee reported April 14, Hamilton dissenting, that Congress was in no wise bound to the ratification, since the act to be ratified was not the provisional articles but the peace proposed by the articles to be concluded—an act "distinct, future, and even contingent"; and that a ratification might oblige Congress immediately to fulfill all the stipulations of the treaty without evidence that a cor-

[1] *Secret Journals*, vol. iii, p. 392.

responding obligation would be assumed by the other party. Hamilton, on the other hand, urged that Congress was bound by the tenor of the treaty immediately to ratify it and to execute the several stipulations. The ratification was unanimously voted on the following day,[1] and the exchange of ratifications in due form ordered if necessary.[2] The definitive treaty, signed September 3, 1783, differed only in unessential wording from the provisional; and on its submission to Congress, December 13, a question arose as to the necessity of a new ratification. Only seven States were represented, and the ratifications were to be exchanged within six months from the signing. It was suggested, and a motion to that effect debated, that the representatives of seven States were competent to authorize the exchange of ratifications, since it was in reality authorized by the action of the nine States on the provisional treaty. On the other hand it was contended, among others by Jefferson and Monroe, that the ratification should be complete since, as was admitted, the treaty did not agree literally with the one ratified, and that it was for the treaty-making authority to decide whether the changes were material. Later, instructions to the commissioners were drawn up by Jefferson, and reported January 3, providing for a provisional ratification by the seven States, with a promise that the question of ratification would be taken up as soon as nine States were assembled.[3] Letters having been addressed to the governors of the delinquent States urging on them the necessity of an immediate representation, the arrival of new delegates rendered the

[1] *Secret Journals*, vol. iii, p. 327.

[2] *Writings of Madison* (Hunt ed.), vol. i, pp. 446, 448, 450. *MSS. Cont. Cong. Papers*, no. 25, vol. ii, p. 197.

[3] *Writings of Jefferson* (Ford ed.), vol. i, pp. 77–83; vol. iii, p. 372.

provisional ratification unnecessary; and on January 14, 1784, the treaty received the unanimous ratification of the nine States represented.[1] The delay of more than a month nevertheless rendered impossible the exchange within the time limited. As this appeared to the British government to have resulted "merely in consequence of the inclemency of the season," it was not thought necessary to enter into any formal convention for the prolongation of the time, and the exchange of ratifications was effected May 12.[2] In the instrument of ratification as adopted by Congress, there appeared to the British government a want of form, wherein the United States were mentioned "before his Majesty contrary to the established custom in every treaty in which a crowned head and a republic" were parties.[3] In reply to this objection Franklin noted the difference between a treaty and the instrument of ratification, saying that in the latter each was master of its own instrument. Although agreeing to submit the matter to Congress, if still desired, for the reason as later expressed in his communication to the President of Congress, June 16, "lest the ill temper should be augmented which might be particularly inconvenient while the commerce was under consideration," he ventured in the meantime to say that he was confident "there was no intention of affronting his Majesty by their order of nomination; but that it resulted merely from that sort of complaisance which every nation seems to have for itself, and of that respect for its own government, customarily so expressed in its own acts, of which

[1] *Secret Journals*, vol. iii, p. 433.

[2] Wharton's *Dip. Cor. of Am. Rev.*, vol. vi, pp. 789, 806. The ratification of the treaty with Sweden was also delayed through the failure of delegates to attend Congress.

[3] Hartley to Franklin, June 1, 1784, *Dip. Cor. 1783–9*, vol. ii, p. 26.

the English, among the rest, afford an instance, when, in the title of the King, they always name Great Britain before France."[1] The reply seems to have been incontrovertible. It may be added that it was not till the conclusion of the treaty of July 3, 1815, with Great Britain, that the United States insisted upon alternate precedence in the treaty itself, with a crowned head of Europe.

3 THE EXECUTION

The treaty of commerce of 1778 with France had promised, *inter alia*, the exaction of no other or greater duties in any port of the United States from French subjects than from the subjects of the most favored nation (Art. III); the exemption of French subjects from the *droit d'aubaine;* the right to dispose of their goods, movable or immovable, by testament, donation or otherwise, and to succeed to the same, without being obliged to obtain letters of naturalization (Art. XI). Similar provisions were inserted in the treaties with the Netherlands (Arts. II and VI), Sweden (Arts. III and VI), and Prussia (Arts. II and X). The treaty with Prussia granted further the most perfect freedom of conscience and worship to Prussian subjects within the United States (Art. XI). In accordance with the frank but far-reaching statement of John Adams the treaty of peace had pledged the nation that British creditors should meet "with no lawful impediment to the recovery" of all *bona fide* debts theretofore contracted (Art. IV). The consular convention with France, which, while not ratified during this period, was negotiated under the authority of the Articles of Confederation, stipulated for an extensive exemption of French consuls from local jurisdiction (Art. II), and for

[1] *Dip. Cor. 1783–9*, vol. ii, pp. 28, 31.

the granting to them of certain powers over French subjects and their property within the jurisdiction of the States. How were these promises to be executed and the faith of the nation to be preserved inviolate? Not by Congress, with nothing but a recommendatory power over these subjects. Not by the States unless the stipulations met with universal approval.[1]

On January 14, 1780, Congress was obliged to resort to a recommendation to the legislatures of the several States to make, where not already made, provision for conferring on French subjects privileges agreeably to the spirit of article XI of the treaty of commerce.[2] A committee composed of Madison, Clymer, and Duane, in a report to Congress July 5, 1782, advised against incorporating in the proposed treaty with the Netherlands a provision by which it should be agreed that the subjects of the one should enjoy the privileges of disposing of their goods, movable and immovable, by testament, donation or otherwise, in the territory of the other, observing that in the opinion of the committee it was at least questionable whether the extension of this privilege to the subjects of other powers than France and Spain would not encroach on the rights reserved by the articles of union to the individual States.[3] The proclamation of the treaty of peace was accompanied by a resolution earnestly recommending to the legislatures of the respective States to provide for the restitution of confiscated estates, and to revise all their acts or laws so as to conform to Articles IV and V of the treaty. The proc-

[1] The Virginian legislature, to remove all doubts as to the effect of the ratification by the Continental Congress of the treaties of 1778, had on June 2, 1779, formally ratified and declared them binding on the State.

[2] *Secret Journals*, vol. ii, p. 568.

[3] *Writings of Madison* (Hunt ed.), vol. i, p. 214.

lamation enjoined all bodies of magistracy, legislative, executive and judiciary, and citizens of the States to "carry into effect," while the proclamations of the treaties with France, the Netherlands and Sweden had directly enjoined the citizens and inhabitants, and more especially the military and naval officers of the United States, "to govern themselves strictly in all things" according to the provisions of the treaty.[1] At times it was even suggested in Congress that treaties of commerce should be submitted to the several States for approval. Fruitless propositions were introduced for the leasing from the States of the control over commerce. The impossibility of obtaining the latter, and the impracticability of the former, led to the advancement of a national doctrine. Jefferson, whose later conservatism in such matters entitles his opinion to much consideration, wrote to Monroe, June 17, 1785, at a time when the commercial independence of the States had become intolerable: "Congress by the Confederation have no original and inherent power over the commerce of the States. But by the ninth article they are authorized to enter into treaties of commerce. The moment these treaties are concluded the jurisdiction of Congress over the commerce of the State springs into existence, and that of the particular States is superseded so far as the articles of the treaty may have taken up the subject." He advised the negotiation of such treaties so as to remove foreign commerce from State interference.[2] It was on Article IV of the treaty of peace, in which it was stipulated that British creditors should meet with no lawful impediment to the recovery of *bone fide* debts

[1] *Journals of Congress*, vol. iv, p. 189. *Secret Journals*, vol. iii, pp. 318, 395, 444, 446.

[2] *Writings of Jefferson* (Ford ed.), vol. iv, p. 55.

that the issue was tried. The stipulation not only was odious, owing to the natural prejudice against the loyal subjects of Great Britain, but also required for its execution a repeal of State laws. Congress had not the power in its legislative capacity to execute—must the nation depend upon the action of prejudiced State legislatures? Assured by the British government of its willingness to co-operate in the execution whenever the United States should manifest a "real determination" to fulfil its part of the treaty, Jay, the Secretary for Foreign Affairs, to whom the matter was referred, made a careful investigation with the conclusion that the failures of the States could not be justified by violations on the part of Great Britain.[1] In his elaborate report on October 13, 1786, he made recommendations which were agreed to by Congress, without a dissenting vote, March 21, 1787. As communicated to the several States in the federal letter, prepared by Jay and adopted by Congress April 13, they read in part:

Resolved, That the legislatures of the several States cannot of right pass any act or acts for interpreting, explaining, or construing a national treaty, or any part or clause of it; nor for restraining, limiting, or in any manner impeding, retarding or counteracting the operation and execution of the same; for that on being constitutionally made, ratified and published, they become in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them.

Resolved, That all such acts or parts of acts as may be now existing in any of the States, repugnant to the treaty of peace ought to be forthwith repealed; as well to prevent their con-

[1] "An investigation of the subject had proved that the violations on our part were not only most numerous and important, but were of earliest date." Madison to Edmund Pendleton, April 22, 1787. *Writings of Madison* (Hunt ed.), vol. ii, p. 355.

tinuing to be regarded as violations of that treaty, as to avoid the disagreeable necessity there might otherwise be of raising and discussing questions touching their validity and obligation.

The third resolution recommended to the several States to make such repeal by a general declaratory act binding the courts of law and equity to decide and adjudge according to the true intent and meaning of the treaty "anything in the said acts, or parts of acts, to the contrary thereof in anywise notwithstanding."[1]

The requests in the second and third resolutions for repeal by the States seemed to some members of Congress unnecessary, and even inconsistent with the first. Upon this Madison observed in the debate, that a law of repeal by the States was both expedient and necessary, since the oaths bound the judges more strongly to State than to federal authority, and even if the treaty had the validity of a law only, while it would repeal all antecedent inconsistent laws, confusion might arise as to those passed subsequently.[2] Later, in a communication to Edmund Pendleton of January 2, 1791, in direct answer to the question whether Congress did not, in calling on the States to repeal the laws, consider Article IV of the treaty a covenant that a law of repeal should be passed rather than a law of repeal in itself, Madison said: "As well as I recollect, the act of Congress on that occasion supposed the impediments repealed by the treaty, and recommended a repeal by the States merely as declaratory, and in order to obviate doubts and discussions."[3]

Again Jay was called upon to express an opinion as to the relative effect of State laws and of treaties. According

[1] *Secret Journals*, vol. iv, pp. 185, 282, 295, 329.

[2] *Madison Papers*, vol. ii, pp. 595, 596.

[3] *Letters and Writings of Madison*, vol. i, p. 523.

to his construction of the most-favored nation clause in the treaty with the Netherlands, an act of the Virginia legislature conflicted with the stipulation. In an opinion given to Congress, October 13, 1787, he said that according to the present state of our national government the act of Virginia would doubtless continue to exist till repealed by the State legislature. Congress on the same day advised the Virginia legislature to take the earliest opportunity of revising the act of which complaint had been made.[1]

Hamilton, in urging the New York legislature to pass a law conformably to the resolutions of Congress of March 21, 1787, replied to the objection that such a law would place too much power in the judges, that the judges were bound not less without the law of repeal than with it to recognize the treaty regardless of any law to the contrary.[2] Jefferson, in a communication to Mr. Hammond, the British minister, on May 29, 1792, in referring to the declarations of repeal by the several States, said, "indeed all this was supererogation. It resulted from the instrument of Confederation among the States, that treaties made by Congress according to the Confederation were superior to the laws of the States."[3] State courts and State officials on various occasions recognized the treaty as a law binding on them.[4] In the debates on the Constitution it was frequently declared that treaties were supreme laws under the Articles of Confederation. Charles Cotesworth Pinckney, in the State convention of South Carolina, said: "I contend that the article in the new Constitution which says that

[1] *Secret Journals*, vol. iv, pp. 410, 413.

[2] *Works* (Lodge ed.), vol. iii, p. 508.

[3] *Am. State Papers For. Rel.*, vol. i, p. 209. [4] *Ibid.*, p. 237.

treaties shall be paramount to the laws of the land is only declaratory of what treaties were in fact under the old compact."[1] What may have been the legal foundation of such contentions need not now be considered. The inability of the national legislature to effect a legislative execution, and the unwillingness of the local legistures to recognize the obligation, moral or otherwise, had produced another expedient which was to be incorporated in the new Constitution, *i. e.*, the operation of the treaty *proprio vigore* as a law binding on the courts, any State laws to the contrary notwithstanding.

III. The Federal Convention and the Period Immediately Following

In the sketch of government presented to the Convention by Hamilton, June 18, 1787, the "Governor," in whom was to be vested the supreme executive authority, was "to have with the *advice* and *approbation* of the Senate the power of making all treaties."[2] The Senate was to consist of persons elected to serve during good behavior by electors chosen for that purpose by the people in election districts, into which the States were to be divided. Although the sketch made no provision as to the apportionment of the Senators among the States, in the paper turned over to Madison, about the close of the Convention, in which Hamilton delineated the Constitution which he had wished to be proposed by the Convention, and in which the organization of the treaty-making power is retained in similar form, it is clearly indicated that the States were not to share equally in the

[1] Elliot's *Debates*, vol. iv, p. 278. See opinions of Mr. Justice Chase and Mr. Justice Iredell in Ware *vs.* Hylton, 3 Dallas, 237, 277.

[2] *Documentary History of the Constitution*, vol. i, p. 327.

representation in the Senate, but in general, according to population.[1] In the draft of the Constitution as reported by the Committee of Detail, August 6, power to make treaties and to appoint ambassadors was by Article IX vested in the Senate.[2] In the discussion, August 15, on the question of restricting the powers of the Senate in originating bills for raising and appropriating money, Francis Mercer, who had taken his seat in the Maryland deputation on August 6, suggested that the power of concluding treaties belonged to the executive department, adding "that treaties would not be final so as to alter the laws of the land, till ratified by legislative authority."[3] In the consideration of Article IX on August 23, Madison observed "that the Senate represented the States alone; and that for this as well as other obvious reasons it was proper that the President should be an agent in treaties."[4] No amendment, however, was made; but the section was referred back to the Committee. In the report of the Committee of Eleven, September 4, to which, on August 31, the undetermined sections had been referred, it was recommended that "The President, by and with the advice and consent of the Senate," should have power to make treaties: but that no treaty should be made "without the consent of two-thirds of the members present."[5] The discussion that followed was confined chiefly to the

[1] *Documentary History of the Constitution*, vol. iii, p. 773. On May 30, Hamilton moved that the rights of suffrage in the national legislature ought to be proportioned to the number of free inhabitants; and on June 11, supported a resolution providing that the same ratio of representation should be observed in both houses. *Ibid.*, pp. 24, 108.

[2] *Ibid.*, p. 451. [3] *Ibid.*, p. 536. [4] *Ibid.*, p. 604.

[5] *Ibid.*, p. 669. The Committee of Eleven was composed of Nicholas Gilman, Rufus King, Roger Sherman, David Brearley, Gouverneur Morris, John Dickinson, Daniel Carroll, James Madison, Hugh Williamson, Pierce Butler and Abraham Baldwin.

proportion of the Senate required. By an amendment proposed by Madison, September 7, and agreed to *nem. con.*, treaties of peace were excepted from the requirement of a two-thirds vote. Different opinions were expressed as to what should be required in case of such treaties. Madison wished the consent of two-thirds of the Senate without the concurrence of the President. Gouverneur Morris desired the concurrence of the President and a majority only of the Senate, while Gerry would require a greater proportion than in the case of other treaties. On the one hand, it was urged that, if two-thirds were to be required for treaties of peace, the minority might perpetuate the war against the wish of the majority, unless the majority should make its wish effective by the disagreeable means of negativing the supplies of war; on the other, that such vital interests of the country as would most likely fall within treaties of peace, such, for instance, as the fisheries and territories, should not be placed in the hands of a majority only, which might represent less than one-fifth of the people. A reconsideration of the clause resulted in striking out the exception. Motions were also entertained to strike out entirely the clause requiring the consent of two-thirds of the members present, to substitute for two-thirds of the members "present" two-thirds of all the members, and to require a majority of the whole number of the Senate. These were defeated by votes of 9 to 1, 8 to 3, and 6 to 5 respectively. A motion by Madison that two-thirds of all the members should constitute a quorum, likewise failed, as did also an amendment that no treaty should be made without previous notice to the members and a reasonable time for their attendance. The provision was finally agreed to as reported by the committee, Penn-

sylvania, New Jersey and Georgia voting in the negative.[1] The requirement, as adopted, of two-thirds of the members "present," not only would remove the possibility of the embarrassment that had been experienced under the Articles of Confederation, through the failure of delegates from nine States to attend, but would at the same time serve as an incentive to attendance.

On August 23, while the treaty power was still vested solely in the Senate, Gouverneur Morris, after expressing doubt as to whether he would agree to confer the making of treaties on the Senate at all, moved to amend the section by adding "but no treaty shall be binding on the United States which is not ratified by a law." Nathaniel Gorham, objecting, suggested the disadvantage that must be experienced if treaties of peace and all negotiations were to be previously ratified—and if not previously, the ministers would be at a loss to know how to proceed, for they must go abroad uninstructed by the authority which was to ratify their proceedings. Samuel Johnson also thought there was "something of solecism in saying that the acts of a minister with plenipotentiary powers from one body should depend for ratification on another body." In reply to Madison's observation on the inconvenience of requiring a "legal *ratification* of treaties of alliance for the purposes of war, &c., &c.," Morris said that in general he was not "solicitous to multiply and facilitate treaties," and that as to treaties of alliance his amendment would necessitate their negotiation at our own seat of government, which he considered desirable. In the debate, several spoke against the amendment. Wilson and Dickinson are recorded as support-

[1] *Documentary History of the Constitution*, vol. iii, pp. 700, 701, 703, 705, 706.

ing it, and in the vote that followed Pennsylvania stood alone in the affirmative, with North Carolina divided. Subsequently to the vote, Madison raised the query whether a distinction might not be made between different kinds of treaties, allowing to the President and Senate the making of "treaties eventual and of alliance," but requiring the concurrence in other treaties of the whole legislature. The section was then referred to the Committee of Five.[1] The significance of the discussion lies especially in the expressions of an idea existing with the members, that the negotiating and ratifying powers should be united in the same body.

In opposing the "dangerous tendency to aristocracy" in the Senate, Wilson, on September 6, observed that treaties were to be "laws of the land" and that the power to make treaties involved "the case of subsidies." On the following day he moved to add after the word "Senate" in the section as reported by the Committee of Eleven, the clause "and the House of Representatives," arguing in favor of his motion that, as treaties were to have the operation of laws, they ought to have the sanction of laws. Against the amendment the necessity of secrecy was advanced, and in the vote Pennsylvania alone supported it. Later, it was also suggested, but without effect, that no rights acquired by the treaty of peace should be ceded without legislative sanction.[2] The House was thus, not without knowledge of the infra-territorial operation of treaties by virtue of another article of the proposed Constitution, excluded from the treaty-making power by the framers.

Upon one provision, there seemed to be unity of senti-

[1] *Documentary History of the Constitution*, vol. iii, pp. 604–606.

[2] *Ibid.*, pp. 686, 687, 704.

ment throughout the Convention. In Randolph's enumeration on May 29 of the defects of the Articles of Confederation, under the first group was placed the inability of Congress to prevent the infraction of treaties.[1] In the resolutions which he submitted, it was recommended that the national legislature be invested with the power to negative all State laws which in its opinion contravened "the articles of Union," as well as with the power to coerce a disobedient State. On May 31, on motion of Dr. Franklin, the clause "or any treaties subsisting under the authority of the Union" was inserted after the word "Union."[2] As thus amended, the section was agreed to in the committee of the whole, without debate or dissent. William Paterson, who represented the conservative element, recommended in his resolutions, introduced June 15, that all treaties made and ratified under the authority of the United States should "be the supreme law of the respective States," and that the judiciaries of the several States should be bound thereby in their decisions, "anything in the respective laws of the individual States to the contrary notwithstanding." The executive was authorized to use the power of the confederated States to enforce and compel obedience.[3] On July 17, Paterson's resolu-

[1] *Documentary History of the Constitution*, vol. iii, p. 16.

[2] *Ibid.*, p. 33.

[3] *Ibid.*, vol. i, p. 325; vol. iii, p. 127. As there seems to be unmistakable evidence that the plan of a Constitution, delivered by Charles Pinckney to the Department of State, December 30, 1818, and to which so much credit has been given, was written subsequently to the Convention and differs from the original draft presented on May 29 to the Convention, it has been entirely passed over in this discussion. It may however be noted that in his letter of December 30, 1818, to the Secretary of the State, communicating the draft, he remarked "I can assure you as a fact that for more than four months and a half out of five, the power of exclusively making treaties, appointing public ministers

tion was substituted for the direct negative by the national legislature; and, with this substitution, the power to negative was transferred from the legislative to the judicial branch of the central government.[1] On August 23, the provision, as reported by the Committee of Detail, was slightly modified so as to read: "This Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the several States and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions, anything in the constitutions or laws of the several States to the contrary notwithstanding."[2] Two days later, on the motion of Madison, seconded by Gouverneur Morris, the article was reconsidered and the clause "or which shall be made" was inserted after the words "treaties made," the purpose being to remove any possible doubt as to the force of pre-existing treaties and more especially of the treaty of peace. With the words inserted referring to future treaties, the words "all treaties made" would refer to those already concluded.[3] In the Committee on Style and Arrangement, composed of Johnson, Hamilton, Gouverneur Morris, Madison and King, the article was moulded into the form in which it appears in the Constitution, the committee, without the direction of the Convention, having modified the expression "supreme law of the several States and of their citizens and inhabitants" so as to read "the supreme law of the land."[4]

and judges of the Supreme Court was given to the Senate after numerous debates and considerations of the subjects both in committee of the whole and in the house." *Ibid.*, vol. i, p. 310.

[1] *Documentary History of the Constitution*, vol. iii, p. 353.

[2] *Ibid.*, vol. iii, p. 600. [3] *Ibid.*, p. 619.

[4] *Ibid.*, p. 733. See *infra*. p. 106.

Down to August 23, specific power had been given to the central government to use the military force for the enforcement of treaties. At the suggestion of Gouverneur Morris, who observed that the provision was superfluous since treaties were to be laws, it was stricken out.[1] The judicial power of the United States was extended to all cases arising under "treaties made, or which shall be made, under their authority," by an amendment on August 27.[2]

The necessity of a more extensive control by the central government in the making and execution of treaties, will always be closely associated with the formation of the closer union as established by the Constitution. In resolutions prepared by Hamilton, and, according to his indorsement, intended to be presented to Congress in 1783, providing for the calling of a convention to revise the Articles of Confederation, the limitation on the power of making treaties with foreign powers is mentioned as a principal defect.[3] Attempts were made in March, 1785, to secure amendments to Article IX of the Articles of Confederation, by which exclusive power to regulate trade should be given to Congress, and in the letter prepared to be addressed to the States, the necessity of an exclusive control by Congress in the execution and interpretation of treaties formed the main reason for the request.[4] The Convention in commending the new instrument to the consideration of the United States in Congress assembled, defended its radical action on the ground that the friends of this country had "long seen

[1] *Documentary History of the Constitution*, vol. iii, p. 601.

[2] See Art. iii, sec. 2 of the Constitution. *Ibid.*, p. 626.

[3] *MSS. Hamilton Papers*, vol. vi, p. 38a.

[4] *MSS. Cont. Cong. Papers*, vol. xxiv, p. 125.

and desired, that power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union."[1]

In the discussion on the proposed Constitution that followed, the provisions concerning treaties received full consideration.[2] In the Virginia convention Patrick Henry was especially bitter towards them. "The power of making treaties," he said, "by this Constitution, ill-guarded as it is, extended farther than it did in any country in the world."[3] To say that treaties were to operate as municipal laws was to him "a doctrine totally novel. To make them paramount to the constitution and laws of the States, unprecedented." The excited speculations at the time as to the possibilities of the treaty-making power, need not now be considered. Suffice it to say that the provisions were fully weighed by those who adopted them. In the Maryland convention an attempt was made to insert an amendment that no treaty should be effectual to repeal or abrogate any part of the constitutions or bills of rights of the States.[4] Mr. Lansing in the New York convention proposed in committee that no treaty should abrogate the constitution of any State or a law of the Union.[5] The seventh of the amendments to the body of the Constitution proposed by the Virginia convention, provided that no commercial treaty should be ratified without the concurrence

[1] The President's letter transmitting the proposed Constitution to Congress. *Ibid.*, vol. ii, p. 1.

[2] See *Writings of Madison*, vol. i, p. 423.

[3] Elliot's *Debates*, (2nd ed.), vol. iii, p. 500.

[4] *MSS. Jefferson Papers*, series 2; vol. xiv, no. 87, p. 6.

[5] *MSS. Hamilton Papers*, vol. vi, p. 83a.

of two-thirds of the whole number of senators, and that no treaty ceding or compromising in any manner the rights or claims of the United States to territory, fisheries in the American seas, or the navigation of American rivers, should be concluded, except in the most urgent and extreme necessity, and then only with the concurrence of three-fourths of all the members of both houses respectively.[1] The first convention in North Carolina which, proceeding on the principle that the modifications should precede the ratification, adjourned in August, 1788, without having definitively acted on the Constitution, recommended the same amendment, as also another which provided that no treaty which might be directly opposed to existing laws of Congress should be valid until such laws had been repealed or made conformable to the treaty, and that no treaty should be valid which was contradictory to the Constitution of the United States.[2] The conference that met at Harrisburg, subsequently to the ratification by Pennsylvania, petitioned the State legislature to secure certain modifications of the Constitution, one of which should provide that no treaty thereafter concluded should be deemed or construed to alter or affect any law of the United States or of any State until assented to by the House of Representatives.[3]

Although much is found in the literature of the period on the clauses of the Constitution relating to the treaty-making power,[4] nothing excels the expositions of the

[1] *Doc. Hist.*, vol. ii, p. 382.

[2] Elliot's *Debates*, vol. ii, p. 546.

[3] *Ibid.*, pp. 271, 274.

[4] See Address of David Ramsay to his fellow countrymen of South Carolina, Ford's *Pamphlets on the Constitution*, p. 376; R. H. Lee in the Letters of a Federal Farmer, *ibid.*, p. 312; George Mason's Objections, *ibid.*, p. 331; James Iredell in the *State Gazette* of North Carolina, *ibid.*, p. 355.

Federalist. Jay, in No. 64, after calling attention to the peculiar fitness of the Senate to co-operate with the President in this capacity writes: "It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite." "The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest." He intimates, however, that the President might proceed independently in "those preparatory and auxiliary measures," important only "to facilitate the attainment of the objects of the negotiation." In reply to those who "profess to believe, that treaties like acts of assembly, should be repealable at pleasure," he says: "This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear." "They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently that as the consent of both was essential to their formation at first so must it ever afterwards be to alter or cancel them." In No. 75 Hamilton discusses the peculiar nature of the treaty-making power as distinguished from the executive and legislative powers. "It relates neither to the execution of the subsisting laws, nor to the sanction of new ones." "Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith." Qualities "indispensable in the management of foreign negotiations, point out the Executive as the most fit

agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them." As to the co-operation of the House, he observes: "Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and despatch, are incompatible with the genius of a body so variable and so numerous." So also "The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty" would be a source of great inconvenience and expense.[1]

IV. Under the Constitution

1 THE NEGOTIATION

The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[2]

In reply to the committee, appointed by the Senate August 3, 1789, to confer with the President on the method of communication between the Executive and the Senate respecting treaties and nominations, President Washington suggested that "In all matters respecting treaties, oral communications seem indispensably necessary, because in these a variety of matters are contained, all of which not only require consideration, but some may undergo much discussion, to do which by written

[1] Lodge's *Federalist*, pp. 400, 465. [2] Art. II, Sec. 2.

communications would be tedious without being satisfactory."[1] The report of the committee, based upon this suggestion, resulted in the adoption by the Senate, August 21, of a rule regulating the manner in which the President should meet the Senate, either in the Senate chamber or in such other place as it might be convened by him.[2] The rule had just been adopted when a message was received announcing the President's intention to meet the Senate the next day "to advise with them on the terms of the treaty to be negotiated with the southern Indians."[3] Following also the practice under the Articles of Confederation of securing prior to the negotiation of Indian treaties an appropriation to defray the necessary expense, President Washington had, on August 7, suggested by special message to both houses the necessity of negotiating with the Indians in the southern district, and the expediency of appointing commissioners for that purpose. The House bill making the appropriation was approved August 20.[4] According to the notification, the President, accompanied by General Knox, who, although not a cabinet officer at the time, was acquainted with the business and prepared to answer questions, appeared in the Senate chamber. After listening to a short paper containing a few explanations, the Senate was called upon to give its advice by answering yes or no to seven questions.[5] This it seemed unwilling to do without having first examined the articles. To a motion made by Robert Morris, to refer the papers to a special committee, a Senator well objected that "No council

[1] *Writings*, (Ford ed.), vol. xi, p. 417.

[2] *Executive Journal*, vol. i, p. 19. [3] *Ibid.*, p. 20.

[4] I, *Annals of Congress*, pp. 59, 63, 65, 711; II, p. 2216.

[5] *Executive Journal*, vol. i, pp. 20-23.

ever committed anything." The President added that, while he had no objection to a postponement, he did not understand "the matter of commitment," that it would defeat every purpose of his meeting the Senate.[1] The questions were accordingly postponed until Monday, at which time they were settled by the Executive and the Senate. The latter maintained its co-ordinate authority by a partial consent to the propositions.[2]

Although President Washington did not again meet the Senate in person to ask its advice, he continued to consult it by message prior to the opening of negotiations.[3] In special messages of August 4, 1790, August 11, 1790, January 18, 1792, and March 26, 1792, he asked advice as to the conclusion of treaties with certain Indian tribes;[4] and the advice and consent of the Senate was in each case given to the conclusion of the treaty in accordance with the articles submitted. In a meeting of the heads of the departments, February 25, 1793, the President was unanimously advised not to consult the Senate previous to the negotiating of a proposed stipulation with the Indians north of the Ohio.[5]

In a communication to the Senate, on February 9, 1790, concerning the differences that had arisen between the United States and Great Britain over the northeastern

[1] Maclay's *Sketches of Debate in the First Senate of the United States*, (G. W. Harris ed.), pp. 122–6.

[2] Maclay in speaking of the withdrawal of the President on Aug. 22 with a "discontented air" says: "Had it been any other than the man who I wish to regard as the first character in the world I would have said with sullen dignity," p. 125.

[3] Rule XXXVI of the Standing Rules of the Senate still provides the method by which the President shall meet the Senate in Executive session.

[4] *Executive Journal*, vol. i, pp. 55, 60, 98, 116.

[5] *MSS. Letters to Washington*, vol. cxvi, p. 252.

boundary, the President said that he thought it advisable to postpone any negotiations on the subject until he had received its advice as to the propositions most proper to be offered on the part of the United States.[1] On May 8, 1792, the Senate was asked if it would approve a convention with Algiers should it be concluded according to the conditions indicated. The Senate agreed to approve such a convention but at the same time specified the conditions.[2] Jefferson, as Secretary of State, in an oral opinion on March 11, and a written communication on April 1, 1792, had advised the President that, since the subsequent approbation of the Senate was necessary to validate a treaty, it should, if the case admitted, be consulted before the opening of the negotiations.[3] In communicating, January 11, 1792, to the Senate the nominations of William Carmichael, chargé d'affaires at Madrid, and William Short, chargé d'affaires at Paris, as commissioners plenipotentiary to negotiate a convention with Spain relative to the navigation of the Mississippi, explanations were made by the President, both as to the nature of the mission and the reasons for opening the negotiations at Madrid.[4] Subsequently to the Senate's confirmation of the commissioners, the Executive decided to extend the negotiations to commercial matters.[5] Jefferson, in submitting to the President instructions for this purpose, observed that they ought to be laid before the Senate to determine whether it would advise and consent that a treaty be entered into conformably thereto.[6] Accordingly, a general outline of

[1] *Executive Journal*, vol. i, pp. 36–7. [2] *Ibid.*, pp. 122–3.

[3] *MSS. Washington Papers*, vol. xxi, p. 91; *Jefferson Papers*, series 4, vol. ii, no. 18.

[4] *Executive Journal*, vol. i, pp. 95, 96. [5] *Ibid.*, p. 99.

[6] *Writings of Jefferson* (Ford ed.), vol. v, p. 442.

the instructions was communicated to the Senate March 7 for "advice and consent to the extension of the powers."[1] On March 16, the Senate (two-thirds of the members present concurring) approved the extension, promising that it would advise and consent to the ratification of a treaty negotiated conformably thereto.[2] Formal instructions, elaborated upon these general principles, were, under date of March 18, prepared by Jefferson.[3] The negotiations, as continued and consummated by Thomas Pinckney, whose nomination had been confirmed by the Senate with knowledge of the nature of the mission, were conducted under the authority of these instructions, together with one subsequently given relative to spoliation claims.[4] In the negotiations leading up to the treaty with Great Britain of November 19, 1794, a different policy was pursued by the Executive. The message of April 16, 1794, communicating to the Senate the nomination of John Jay as envoy extraordinary to Great Britain, contained only a general statement of the serious aspect of our relations with that country, and was not accompanied by his instructions, nor were they subsequently submitted.[5] This was not overlooked by the Senate, as is evidenced by an unsuccessful motion introduced April 17, prior to Jay's confirmation on April 19, requesting the President to inform the Senate "of the whole business with which the proposed envoy" was to be charged.[6] Gouverneur Morris had in October, 1789, been commissioned by the President, without confirmation by the Senate, in a private and unofficial

[1] *Executive Journal*, vol. i, p. 106. [2] *Ibid.*, p. 115.
[3] *Am. State Papers For. Rel.*, vol. i, p. 252.
[4] *Ibid.*, p. 533, *Executive Journal*, vol. i, pp. 163-4.
[5] *Executive Journal*, vol. i, p. 150. [6] *Ibid.*, p. 151.

character, to enter informally into conferences with the British government. His instructions, with explanations as to the nature and results of the mission, were subsequently, February 14, 1791, laid before the Senate.[1] Although John Paul Jones and David Humphreys had been commissioned without confirmation by the Senate to negotiate with Algiers, the Senate in other ways approved of the negotiations.[2]

These first attempts of the Executive to follow out the evident intention of the framers of the Constitution, in consulting the Senate prior to the opening of negotiations, have been followed only in exceptional instances. President Van Buren in a message to the Senate, June 7, 1838, cautiously stated that he was about to open negotiations for a commercial treaty with Ecuador, and gave opportunity to the Senate for an expression of its opinion as to whether it expected to be consulted before the opening of such negotiations.[3] President Polk submitted on June 10, 1846, the proposed Oregon treaty for the Senate's advice as to its conclusion. The conclusion of the treaty having been advised (two-thirds concurring), the treaty was signed June 15, and again submitted for consent to the ratification.[4] President Buchanan communicated with the Senate, February 21, 1861, in relation to the misunderstanding that had arisen as to the interpretation of the clause of the Oregon treaty defining the northwestern water boundary, and enquired whether the Senate would approve a treaty by which the controversy should be referred to arbitration.[5] President Lincoln sanctioned this procedure of

[1] *Executive Journal*, vol. i, p. 73. *Am. State Papers For. Rel.*, vol. i, p. 122.

[2] *Ibid.*, pp. 290, 294.

[3] *Executive Journal*, vol. v, p. 119.

[4] *Ibid.*, vol. vii, p. 95.

[5] *Ibid.*, vol. xi, p. 279.

his predecessor, and asked in a message of March 16, 1861, the further advice of the Senate.[1] On December 17, 1861, the same President transmitted for its advice a draft of a convention, which he had proposed to the Mexican government, to guarantee the payment of claims urged by certain European powers against that government.[2] President Johnson in a message of January 15, 1869, consulted the Senate as to the expediency of concluding with Great Britain a naturalization convention on the basis of a protocol signed at London, October 9, 1868.[3] President Grant on receiving a dispatch from our minister resident in Honolulu relative to the annexation of the Hawaiian islands to the United States, transmitted it to the Senate, at the same time observing that "the views of the Senate if it should be deemed proper to express them would be very acceptable with reference to any future course which there might be a disposition to adopt."[4] In a message of May 13, 1872, the President submitted an article proposed by the British government for removing the differences that had arisen in the proceedings of the Geneva tribunal, and asked advice as to its formal adoption. The Senate recommended, May 25, the negotiation of an article which did not conform to the one proposed.[5] On June 18, 1874, the President submitted a draft of a proposed agreement with Great Britain relative to reciprocity with Canada. The Senate by a resolution of February 3, 1875, declared it inexpedient to negotiate the treaty.[6] A proposal from the king of the Hawaiian Islands for the

[1] *Executive Journal*, vol. xi, p. 308. [2] *Ibid.*, vol. xii, p. 24.
[3] *Ibid.*, vol. xvi, p. 441.
[4] Richardson's *Messages and Papers of the Presidents*, vol. vii, p. 131.
[5] *Executive Journal*, vol. xviii, p. 264. [6] *Ibid.*, vol. xix, pp. 355, 502.

extension for a period of seven years of the existing reciprocity treaty was on June 9, 1884, before the opening of negotiations for that purpose, communicated by President Arthur to the Senate for consideration.[1]

The Senate has occasionally of its own motion expressed, by means of resolutions, its wish as to the opening of negotiations. These are, however, not unusually joint or concurrent, and its initiative in such resolutions is not dependent upon its treaty-making authority. A joint resolution approved March 3, 1883, requested the President to open negotiations with Venezuela with a view to reopening the claims of citizens of the United States under the treaty of April 25, 1866, with that nation. The treaty of December 5, 1885, resulted.[2] A concurrent resolution adopted by the Senate February 14, and by the House April 3, 1890, requested the President to invite negotiations with other powers with a view to providing for the settlement by arbitration of disputes that might not be adjusted through diplomatic channels. Negotiations were eventually instituted which resulted in the unratified treaty with Great Britain of January 11, 1897.[3] An act approved June 28, 1902, advised the President as to stipulations that should be entered into for the purpose of constructing an interoceanic canal.[4] In accordance with the act, a treaty was signed with Colombia January 22, 1903. The Senate cannot, however, be said to have been solicitous in this respect, and it has from the first recognized the inexpediency of attempting to detail in

[1] *Executive Journal*, vol. xxiv, p. 280. See for a comprehensive discussion on this topic by Senator Henry Cabot Lodge, *Scribner's Magazine*, vol. xxxi, p. 33.

[2] *28 U. S. Statutes at Large*, 1053.

[3] Moore, *International Arbitrations*, vol. i, p. 962.

[4] *Public Statutes*, 1901–2, p. 481.

advance the propositions to be submitted in negotiations. Following its consent to the ratification of the treaty with Great Britain of July 3, 1815, resolutions were introduced advising the President to pursue the negotiations in order to obtain six, later increased to eight, specific objects outlined in the resolutions. Mr. Bibb, in a report, February 15, 1816, from the Committee on Foreign Relations, to which the matter had been referred, observed that an examination of the correspondence furnished satisfactory evidence that no effort which belonged to the negotiators had been neglected, and that the failure to arrange the subjects embraced by the resolutions was owing to the manifest indisposition of the British plenipotentiaries to concur in any satisfactory stipulations concerning them; that if the proper moment had arrived to renew the negotiations, the President would doubtless take advantage of it, for he had the interests of the country at heart in common with the Senate, and, since he conducted correspondence with foreign nations, would be more competent to determine when, how, and upon what subjects negotiations could be urged with the greatest prospect of success; and that, moreover, the differences of opinion between members of the Senate on propositions to advise the President would prevent that unity of design, secrecy and despatch so requisite for successful negotiations.[1]

As a matter of expediency individual members, and especially those on the Committee on Foreign Relations, to which all treaties are referred in the Senate, are not infrequently consulted on important negotiations. In 1871, after the unqualified rejection (44 to 1) by the Senate

[1] *Compilation of Reports of the Senate Com. on For. Rel.*, Sen. Doc., 231, pt. 8, p. 22, 56th Cong. 2nd Sess. See also to same effect, report on Feb. 19, 1862, by Mr. Sumner, *ibid.* p. 132.

of the Johnson–Clarendon convention, Mr. Fish did not feel warranted in reopening negotiations without some understanding with members of that body. He accordingly conferred with prominent senators on both sides of the chamber, and took the advice of Mr. Sumner, who was then Chairman of the Committee on Foreign Relations, concerning the basis of the proposed negotiations, although he did not afterwards follow the particular course that Mr. Sumner recommended.[1]

While practice was not uniform, yet in the most important negotiations down to, and including the treaty of commerce and navigation with Great Britain of July 3, 1815, the President submitted to the Senate for confirmation the names of the commissioners appointed to negotiate, with an intimation as to the purpose of the mission. In communicating, May 31, 1797, to the Senate for confirmation the nomination of C. C. Pinckney, Francis Dana and John Marshall as envoys extraordinary and ministers plenipotentiary to the French Republic, President Adams explained in general terms that they were appointed "to negotiate with the French Republic, to dissipate umbrages, to remove prejudices, to rectify errors, and adjust all differences by a treaty between the two powers."[2] The Senate confirmed the nominations June 5, and on June 22 the substitution of Elbridge Gerry for Francis Dana.[3] When negotiations were reopened in 1799 the Senate was called upon to confirm new nominations.[4] President Jefferson asked the Senate, January 11, 1803, for its advice and consent to the appointment of James Monroe and Robert R. Liv-

[1] Moore, *International Arbitrations*, vol. i, p. 525.

[2] *Executive Journal*, vol. i, p. 241.

[3] *Ibid.*, vol. i, pp. 243, 245.

[4] *Ibid.*, pp. 317, 326.

ingston as plenipotentiaries, with full powers "to enter into a treaty or convention with the First Consul of France, for the purpose of enlarging, and more effectually securing, our rights and interests in the river Mississippi, and in the territories eastward thereof."[1] The nominations of J. Q. Adams, James A. Bayard, Henry Clay, and Jonathan Russell, were advised and consented to January 18, 1814, and that of Albert Gallatin, who had previously been rejected on the grounds that the duties of an envoy were incompatible with those of the Secretary of the Treasury,[2] February 9, as ministers plenipotentiary and extraordinary to negotiate and sign a treaty of peace and a treaty of commerce with Great Britain.[3]

Since 1815 this course has been exceptional.[4] Nearly

[1] *Executive Journal*, vol. i, p. 431.

[2] His successor in the office of Secretary of the Treasury was confirmed Feb. 9, immediately preceding his own confirmation as minister to negotiate with Great Britain. *Ibid.*, vol. ii, pp. 355, 389.

[3] *Ibid.*, pp. 454, 471. See for other confirmations, during this period, of special commissioners appointed to negotiate treaties, *ibid.*, vol. i, pp. 265, 310, 311, 432, 440; vol. ii, pp. 25, 29.

[4] In a minority report of the Senate Committee on Foreign Relations, signed by John T. Morgan, Eli Saulsbury, Joseph E. Brown and H. B. Payne upon the unratified fisheries treaty with Great Britain of Feb. 15, 1888, this question was examined in detail. The report states that the "whole number of persons appointed or recognized by the President without the concurrence or advice of the Senate, or the express authority of Congress, as agents to conduct negotiations and conclude treaties [prior to June 25, 1887] was four hundred and thirty-eight. Three have been appointed by the Secretary of State and thirty-two have been appointed by the President with the advice and consent of the Senate." According to the list attached to the report, only the commissioners to the Panama Congress, and those of 1880 to negotiate with China, had, since 1815, been specially commissioned by and with the advice and consent of the Senate. Sen. Doc. 231, pt. 8, p. 332 *et seq.*, 56th Cong., 2d Sess.

one-third of all the treaties concluded have been signed at Washington by the Secretary of State, while a large proportion of the remainder have been negotiated through regular diplomatic representatives confirmed as such by the Senate, but commissioned to enter upon the negotiations solely on Executive authority. In consenting to the ratification of treaties concluded by special agents appointed without its consent, the Senate has taken occasion to express its disapproval of the practice. Treaties with the King of Siam and the Sultan of Muscat were signed March 20, and September 21, 1833, respectively, on the part of the United States by Edmund Roberts, a special and secret agent commissioned for this purpose by the President. Immediately after advising their ratification, to which no opposition appears to have been made, a resolution was introduced declaring that, while the Senate deemed the ratification expedient, it felt "itself constrained by a high sense of its constitutional duty to express its decided disapprobation of the practice of appointing diplomatic agents to foreign countries by the President alone, without the advice and consent of the Senate." On the motion of Mr. Webster the resolution was tabled.[1] In the resolutions of January 9, 1883, advising and consenting to the ratification of the treaty with the Kingdom of Korea, signed May 22, 1882, on the part of the United States, by Commodore R. W. Shufeldt, specially commissioned by the President, the Senate declared that it did not by this act "admit or acquiesce in any right or constitutional power in the President to authorize" any person to negotiate treaties with a foreign power unless such person had been appointed for such purpose or clothed with such power by

[1] *Executive Journal*, vol. iv, pp. 413, 445.

and with the advice and consent of the Senate, except in the case of a Secretary of State or a diplomatic officer appointed by the President to fill a vacancy during the recess of the Senate. The purpose of the declaration was to prevent the means employed being drawn into precedent.[1] A resolution of similar import was introduced into the Senate July 20, 1888, relative to the negotiation of the unratified fisheries treaty with Great Britain.[2] The Executive has recognized no limitation in this respect. Among treaties thus concluded, by special agents employed by the President, with countries with which diplomatic relations did not at the time exist, besides the three mentioned above, may be enumerated those signed in 1815 and 1816 with Algiers; May 7, 1830, with the Ottoman Porte; September 16, 1836, with Morocco; November 26, 1838, with Sardinia; various treaties of 1846 and 1847, negotiated by A. Dudley Mann with certain of the German states; February 2, 1848, with Mexico; November 25, 1850, with Switzerland; March 31, 1854, June 17, 1857, and July 29, 1858, with Japan; May 29, 1856, with Siam; November 3, 1864, with Hayti; February 8, 1867, with the Dominican Republic; December 22, 1871, with the Orange Free State; November 16, 1884, with Egypt; and July 3, 1886, with Zanzibar. Special agents have also been employed instead of the regular diplomatic officers when the latter were available. For instance, the recent reciprocity treaty with Cuba was negotiated by Gen. T. H. Bliss, who was specially commissioned by the President, although a diplomatic officer had been accredited to the new republic.

Of the five commissioners appointed by the Presi-

[1] *Executive Journal*, vol. xxiii, p. 585. [2] *Ibid.*, vol. xxvi, p. 314.

dent, September 13, 1898, to negotiate a treaty of peace with Spain, three were prominent members of the Senate, and of the Committee on Foreign Relations, a procedure quite without precedent.

2 THE RATIFICATION

Treaties are ratified by the President with the advice and consent of the Senate.

(a) *The Senate.*—The consular convention with France, signed November 14, 1788, on the authority of instructions approved by the Congress, which was the treaty-making power under the Articles of Confederation, was communicated to the Senate June 11, 1789, and was the first to come before the government under the Constitution for ratification.[1] Many objections having been raised against it, Jay, who continued in charge of foreign affairs, was, on July 22, requested to give his opinion how far he conceived the faith of the United States to be engaged to ratify the convention in its then existing form. In his report to the Senate, on July 25, he observed that the original scheme, however exceptionable, was framed and agreed to by Congress; that the refusal to ratify the convention of 1784, because of its deviation from that scheme, was accompanied by a promise to ratify one in conformity with it, provided that the new convention should be limited in its duration; and that in the commission to Jefferson, Congress had likewise promised ratification if these conditions were complied with. Although he apprehended that the new convention would prove more inconvenient than beneficial to the United States, yet he thought the circumstances under which it

[1] Various Indian treaties were submitted May 25, but were not considered by the Senate until after its action on the French convention.

was formed rendered its ratification by the Senate indispensable.[1] On July 29 it was unanimously resolved that "the Senate do consent to the said convention, and advise the President of the United States to ratify the same."[2] So also in its action on Indian treaties, negotiated on its advice and consent, the Senate recognized an obligation to confirm what it had already authorized. The committee, to which the treaty of July 2, 1791, with the Cherokees had been referred, observed, in its report to the Senate, that the treaty strictly conformed to the instructions of the President, founded on the advice and consent of the Senate, given August 11, 1790.[3]

In the ratification of the Jay treaty, the position of the Senate was essentially different. Although Jay's nomination as minister to England was submitted to, and confirmed by the Senate, his instructions were not submitted to that body, and in his negotiations he acted under the directions of but one branch of the treaty-making power. No doubt could therefore exist as to the constitutional right of the Senate as a co-ordinate branch of the treaty-making power to give an independent approval or disapproval of the treaty thus negotiated. If the treaty were in the main acceptable, but contained objectionable provisions, two courses were at this stage open to the Senate—to withhold action altogether until the desired changes had been effected, or to advise the ratification on condition that the changes be made. On June 22, 1795, a motion was introduced providing that further consideration of the treaty be postponed, and that the President be recommended to proceed to effect certain enumerated changes.[4] The ratification was, however, on

[1] *Executive Journal*, vol. i, p. 7. *Dip. Cor. 1783–9*, vol. i, pp. 304–322.
[2] *Executive Journal*, vol. i, p. 9. [3] *Ibid.*, p. 88. [4] *Ibid.*, p. 183.

June 24, advised and consented to "on condition" that there should be added to the treaty an article whereby it should be agreed to suspend the operation of so much of the twelfth article as related to the trade between the United States and the British West Indies; and the Senate further advised the President "to proceed without delay to further friendly negotiations with his Majesty, on the subject of the said trade and of the terms and conditions in question."[1] The question was immediately raised by the Secretary of State, Edmund Randolph, whether the resolution was to be considered as the final act of the Senate, or whether the proposed new article must be submitted before the treaty could take effect. On June 29, the President requested the opinions of the members of the cabinet upon the question. They were agreed that it would be unnecessary for the treaty to be sent again to the Senate. Hamilton, who, although not in the cabinet at the time, was consulted, expressed a different opinion.[2] The Secretary of State, in his written opinion, on July 12, argued that, as the final ratification was given by the President, and not by the Senate, the action of the Senate, even in case it advised and consented unconditionally, was taken upon a treaty the completion of which was reserved to the President; that the Senate, consequently, might give its advice and consent without having the very treaty which was to be ratified before it; that if the President should ratify without again consulting that body, he would be responsible for the accuracy with which its advice was followed; and that if he should ratify what had not been

[1] *Executive Journal*, vol. i, p. 186.

[2] See Washington to Hamilton, July 14, 1795. *MSS. Hamilton Papers*, vol. iv, pp. 100, 127.

advised, the treaty, for that very reason, would not be the supreme law of the land, and in this lay the security to the Senate.[1] Upon the question of submitting to the Senate an article already drawn, he had earlier observed, in a communication to the President: "Thus much is true, that unless such a proposition should originate from him, it cannot originate from the Senate; because they have no right to make *independent* propositions upon an *executive* matter. I say *independent*, for I consider the proposition of a qualified ratification as connected with their constitutional power over the treaty."[2] Conformably to the advice of the cabinet, the suspension of the operation of the twelfth article having been agreed to by the British government, the ratifications were exchanged at London, October 28, without the treaty being again submitted to the Senate.[3]

In consenting, March 6, 1798, to the ratification of a treaty with Tunis, signed in August, 1797, the Senate likewise attached a condition, that Article XIV should be suspended, and advised the President to enter into further negotiations on the subject of the article. In complying with this recommendation slight modifications of other articles were introduced. Accordingly, the articles were resubmitted by President Adams to the Senate, and their ratification was advised December 24, 1799.[4]

Not usually consulted as to the conduct of negotiations, the Senate has freely exercised its co-ordinate authority

[1] *MSS. Washington Papers*, vol. xxii, pp. 148, 184, 200.

[2] *MSS. Letters to Washington*, vol. cxvii, p. 271.

[3] Individual senators in the opposition had expressed the opinion that the resolution advising ratification was so worded as to require the resubmission of the treaty to the Senate. See Tazewell to Monroe, June 27, 1795. *MSS. Monroe Papers*, vol. viii, p. 951.

[4] *Executive Journal*, vol. i, pp. 263, 264, 328, 330.

in treaty-making by means of amendments. Where the treaty as negotiated is not entirely acceptable to the Senate, it is the practice of that body, if it gives its advice and consent to the ratification, to do so with specific amendments, which renders unnecessary the resubmission of the instrument after the consent of the other party to the designated changes has been obtained. But the approval, whether qualified or unqualified, of the treaty by the Senate is not to be confused with the act of ratification. The latter is performed by the President, and is unconditional, even where it relates to a treaty which, because of amendments by the Senate, differs from the one first signed. While the Senate's practice of amending treaties continues to meet with criticism by foreign writers, it would not be contended for a moment that the Senate might not reject *in toto*, or withhold action altogether until the changes which it might indicate by resolution or otherwise had been negotiated.[1] So far as it affects the other contracting party, it is difficult to distinguish the latter mode from that followed by the United States. The objection usually urged is, that the amendments are made by persons unfamiliar with the negotiations, and that they are in the nature of an ultimatum. The proposed treaty is not infrequently so amended as to be unacceptable to the other power, and no treaty results.

Of treaties rejected by the Senate through a failure to act on them, or outright, may be mentioned, besides the

[1] The Senate in advising the ratification of the extradition treaty with the Netherlands, signed Nov. 24, 1903, attached an amendment. On the representation of the minister of the Netherlands, that procedure in his country had no provision for an amendment to a treaty, a new treaty embodying the amendment was signed Jan. 18, 1904, and submitted to the Senate.

various recent treaties for commercial reciprocity, the important treaties signed: March 25, 1844, with the German Zollverein; July 20, 1855, with Hawaii; October 24, 1867, with Denmark for the cession of the islands of St. Thomas and St. John; November 29, 1869, for the annexation of the Dominican Republic; December 10, 1824, with Colombia for the suppression of the African slave trade; March 6, 1835, with the Swiss Confederation; April 12, 1844, for the annexation of Texas; December 14, 1859, with Mexico relative to transits and commerce; May 5, 1860, with Spain for the settlement of claims; May 21, 1867, with Hawaii for commercial reciprocity; and the following with Great Britain: January 14, 1869, for the adjustment of outstanding claims; June 25, 1886, for the extradition of criminals; February 15, 1888, for the regulation of the fisheries; and January 11, 1897, for the settlement of disputes by arbitration.

From the first there has been inserted in the full powers of the negotiators a reservation of the right of ratification, which frequently, although not uniformly, explicitly provides that the ratification shall be by the President, by and with the advice and consent of the Senate.[1] In commenting on Jefferson's rough draft of the instructions of March, 1792, to the commissioners to negotiate with the court of Spain, Hamilton suggested a variation of the stipulation, reserving the right of ratification, so as to indicate the participation of the Senate. Jefferson, however, considered a stipulation that the treaty should be ratified to be sufficient, without designating by what body of individuals.[2] The instruction was unmodified,

[1] *Am. State Papers For. Rel.*, vol. i, pp. 471, 533. *Sen. Doc.* 62, pt. 1, p. 16, 55th Cong., 3rd Sess.

[2] *Writings of Jefferson* (Ford ed.), vol. v, p. 445.

and the treaty of October 27, 1795, was drawn up accordingly. In the treaty with Great Britain of November 19, 1794, however, as has been the more usual practice, a clause was inserted specifying that it should be ratified by the President with the advice and consent of the Senate.

All motions and questions in the Senate upon a treaty, except to postpone indefinitely and to give the final advice and consent to the ratification, both of which require a two-thirds vote, are decided by a majority.[1] It has not unfrequently happened that a treaty as amended has failed on the final vote to receive the requisite two-thirds, but has been reconsidered, differently amended, and agreed to.[2] This causes no embarrassment so long as the reconsideration, as is usually the case, immediately follows. On March 16, 1860, the Senate rejected a treaty with Nicaragua, signed March 16, 1859, and the resolution of rejection was ordered to be placed before the President. Four days later the Senate requested the President to return the resolution. The request being complied with, it reconsidered its action and approved the treaty with amendments, June 26.[3] The ratification of an agreement with Venezuela, signed January 14, 1859, for the settlement of the Aves Island claims was, with amendment, advised June 26, 1860, and a resolution to that effect laid before the President. On January 24, 1861, the Senate requested the return of the agreement for further consideration. In complying with the request, President Buchanan recommended the with-

[1] Standing Rule XXXVII, clause 1.

[2] See *Executive Journal*, vol. ix, p. 312; vol. x, p. 144; vol. xiii, pp. 416, 423; vol. xxvii, p. 470.

[3] *Ibid.*, vol. xi, pp. 165, 218.

drawal of the amendment. The ratification was advised without amendment February 21, 1861.[1] On March 27, 1874, the Senate unanimously advised the ratification of an extradition convention with Belgium, signed March 19, and the resolution was ordered to be laid before the President. On April 8, subsequently to the ratification by the President on March 31, but prior to the exchange of ratifications on April 30, the Senate passed a resolution requesting the President to return the resolution of March 27, advising ratification. Two days later, however, the resolution of April 8 was rescinded.[2] On June 12, 1884, the Senate voted unanimously against the accession of the United States to the international convention for the protection of industrial property, signed at Paris, March 20, 1883. The convention was returned to the Senate, February 2, 1885, by President Arthur, with a message recommending reconsideration, and on March 2, 1887, the Senate advised the ratification.[3]

The Senate sat with closed doors during its legislative as well as its executive sessions down to the end of the first session of the third Congress. A resolution adopted February 20, 1794, provided that the legislative proceedings, except in such cases as might in the opinion of the Senate require secrecy, should, after the end of that session, be with open doors.[4] On December 22, 1800, a rule was adopted providing that all treaties laid before the Senate should be kept secret until the injunction of secrecy had been removed by a resolution.[5] This obviated the necessity of voting a special injunction of

[1] *Executive Journal*, vol. xi, pp. 222, 254, 276.

[2] *Ibid.*, vol. xix, pp. 281, 291. See also vol. xi, pp. 147, 153.

[3] *Ibid.*, vol. xxiv, pp. 287, 455. [4] *Annals 3rd Congress*, pp. 9, 47.

[5] *Executive Journal*, vol. i, p. 361.

secrecy. According to Clause 3 of Rule XXXVI of the Standing Rules of the Senate "all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall by their resolution, take off the injunction of secrecy, or unless the same shall be considered in open Executive session." This has been interpreted by the Committee on Rules as extending to each step in the consideration of treaties "including the fact of ratification."[1] The injunction of secrecy is often removed from the treaty itself early in the proceedings. In the case of the recent Cuban reciprocity treaty, however, the Senate adjourned without removing the injunction, although it had given its qualified consent to the ratification. The treaty with the Senate amendments was made public by the President in a communication to Congress, November 10, 1903, prior to the removal by the Senate of the injunction of secrecy. The proposed fisheries treaty of February 15, 1888, was formally debated in open executive session, and appears to be the only treaty thus discussed, pursuant to a formal vote.[2]

As amendments to a treaty are made by the Senate in secret session, and no opportunity is given for mutual consideration, the other contracting party having had no part in the formation and wording of them, the Executive is often met, before proceeding to the exchange of ratifications, with requests for explanations as to their construction and the reasons for their insertion. An im-

[1] *Manual*, p. 31.

[2] The difficulty which has frequently been experienced in keeping a treaty and the proceedings on it secret, was portended in the proceedings on the Jay treaty. Contrary to the special resolution of the Senate imposing an injunction of secrecy, a copy of the treaty was given out by Senator Mason of Virginia to be printed.

portant discussion as to the value of such explanations resulted from the signing of the protocol of May 26, 1848, explanatory of the amendments made by the Senate to the treaty of peace with Mexico. Ambrose H. Sevier and Nathan Clifford were commissioned, March 18, 1848, to exchange the ratifications of the treaty on the part of this government, in the form in which it had been amended by the Senate. An additional power was given to modify the method of payment as provided in Article XII as amended, specifically reserving to the President, with the advice and consent of the Senate, the ratification of such modification. In the accompanying instructions, the commissioners were carefully reminded that they were not sent to Mexico for the purpose of negotiating a new treaty; that the amendments adopted by the Senate could not be rejected or modified except by authority of that body; that, if it should become necessary, as it "most probably" would, to explain the reasons which had influenced the Senate in adopting the several amendments, such explanations were to be given so far as possible informally and verbally; and that the authority of the mission did not extend to the slightest modification of the provisions of the treaty. Subsequently to the approval of the treaty by the Mexican Congress, but prior to its ratification by the President of Mexico *ad interim*, the American commissioners were induced to sign in "the name of their government," the protocol making "suitable explanations in regard to the amendments." President Polk, considering the explanations to be in accordance with the treaty, did not deem it necessary to take any action on the subject, but treated them in the same manner as if they had been "verbally given." In February, 1849, the Mexican minister at Washington requested a definite

assurance that the United States would never give to the amended articles any other sense or interpretation than that expressed in the protocol. To this Mr. Clayton, Secretary of State, on April 11, replied in conclusion: "It is clear, therefore, that the protocol must be regarded merely as an instrument stating the opinions of the commissioners of the United States upon the amendments of the Senate, and utterly void if not approved by that body."[1] In the Senate, on March 22, a resolution was introduced by Mr. Benton to the effect that the explanations of the commissioners duly commissioned to give them, ought to be held binding upon the United States. On the following day, Mr. Seward offered a resolution declaring the attached protocol to be no part of the treaty, not having been passed upon by the Senate.[2] Neither resolution brought out an official expression of the Senate.

While the government that refuses to exchange the ratifications of a treaty with the United States until explanations are made, cannot plead ignorance of the constitutional provisions under which all treaty obligations must be contracted, yet such explanations, even if only tacitly approved by the Executive, although they cannot without the approval of the Senate modify or form part of the treaty and of the law of the land for judicial construction, are not without influence in a diplomatic controversy. Safe precedents have been established in this respect. The Senate in advising the ratification of the convention with France of September 30, 1800, struck out Article II. The First Consul in

[1] *Sen. Doc. 1*, pp. 69, 84, 85, 31st Cong., 1st Sess.; *Ex. Doc. 50*, pp. 9, 47, 48, 30th Cong., 2nd Sess.

[2] *Ex. Journal*, vol. viii, pp. 94, 96.

exchanging, on July 31, 1801, the ratifications of the convention as amended, attached the declaration, "That by this retrenchment [amendment] the two states renounce the respective pretensions which are the object of the said article." In view of this declaration, President Jefferson thought it his duty before proclaiming the convention as the law of the land to re-submit it to the Senate. The Senate resolved, two-thirds of the members present concurring, that it considered the convention as duly ratified, and directed it to be returned to the President for the usual promulgation.[1] In advising the ratification on January 22, 1875, of the naturalization convention signed with the Ottoman Porte, August 11, 1874, the Senate attached two amendments. According to the treaty as signed, a naturalized person who went back to the country of his origin without an intention to return to the country of his adoption, was to be considered as having renounced his naturalization; and the absence of an intention to return was to be conclusively presumed from a residence of more than two years. By the treaty as amended, this presumption was to be merely *prima facie*. With the exchange of ratifications at Constantinople, the Sublime Porte introduced a proviso that it was understood that the Ottoman government should have the right to consider native Ottoman subjects who had resided in the Empire more than two years as having renounced their naturalization in the United States, the latter country to have the same right as to its citizens naturalized in the Empire. Although the proviso rendered the Senate amendments practically nugatory, the American minister, Mr. Boker, proceeded to the exchange of ratifications April 22, 1875. On

[1] *Ex. Journal*, vol. i, pp. 397–9.

being informed of the proviso, Mr. Fish, Secretary of State, immediately pronounced the exchange of ratifications invalid, and the treaty was not proclaimed.[1] Mr. Bayard, when asked by the Hawaiian minister at Washington to confirm the view that an amendment made by the Senate to the convention of December 6, 1884, for the purpose of giving to the United States the exclusive use of Pearl Harbor for a naval station, did not diminish the autonomous jurisdiction of Hawaii or convey a privilege that would survive the treaty, replied in the sense desired, but added: "The limitation of my official powers does not make it competent for me in this connection to qualify, expand or explain the amendments ingrafted on that convention by the Senate."[2] The British government in the negotiations of 1861, relative to a convention which should embody the principles of the Declaration of Paris, proposed, upon the signing of the convention, to make a declaration that Her Majesty did not intend thereby to undertake any engagement which should have any bearing direct or indirect on the internal differences then prevailing in the United States. On this proposition, Charles Francis Adams observed, August 23, 1861, that if the declaration were to be considered as a part of the treaty, it must be submitted to the Senate for its advice and consent: if it were not to be so considered, the party making it could obtain no advantage from it.[3] It need hardly be added that such a declaration or explanation when agreed to by the Senate forms a part of the treaty.[4] In pursuance of a resolution of the Senate of April 24, 1872, an explanatory protocol was signed April 29, on the exchange

[1] *For. Rel. 1896*, pp. 930, 934.
[2] *For. Rel. 1887*, p. 591.
[3] *Dip. Cor. 1861*, p. 138.
[4] Doe *vs.* Braden, 16 How., 635.

of ratifications of the consular convention of December 11, 1871, with the German Empire, construing expressions in that convention.[1] In 1897 a peculiar case came before the Supreme Court. In consenting, June 11, 1838, to the ratification of a treaty with certain Indian tribes, the Senate in executive session attached a proviso. The President in his proclamation omitted it, and it was never communicated to the Indian tribes. There being no evidence that the President approved the proviso, and the other contracting party having never been informed of its existence, the Court held that it formed no part of the treaty.[2]

The extension of the term of an international commission organized under a treaty, a change in the place of meeting or in the time within which claims may be presented, and an extension of the period within which the exchange of ratifications is to take place, have been considered such modifications of the treaty as to require the consent of the Senate. In respect of the change in time of ratifications, prior to 1829, the treaties signed September 30, 1800, with France, September 4, 1816, with Sweden and Norway, and February 22, 1819, with Spain, require consideration. In the case of the first-named treaty the period expired before the exchange was effected, but the treaty was for another purpose reconsidered by the Senate. The exchange in the case of the second was not made until September 25, 1818, more than a year and four months after the expiration of the time-limit, and it does not appear that the Senate was asked to consent to the exchange. In the treaty of February 22, 1819, the period was limited to six months, but the Spanish

[1] *Ex. Journal*, vol. xviii, p. 240.

[2] New York Indians *vs.* United States, 170 U. S., 1, 23.

king did not ratify until October 24, 1820. The time having expired, and a declaration having been attached to the Spanish ratification, President Monroe, in a message of February 13, 1821, asked the advice of the Senate as to receiving it "in exchange for the ratification of the United States heretofore executed." The Senate considered both the Spanish ratification and the treaty itself, and on February 19, 1821, again advised the ratification of the treaty, not, however, unanimously, as on the first occasion, and it was on the authority of this resolution, rather than the first, that the treaty was ratified by President Monroe February 22, 1821.[1] The time for the exchange of the ratifications of the treaty with Prussia of May 1, 1828, having elapsed, President Jackson, "to avoid all future questions," asked, in a message of March 6, 1829, the advice and consent of the Senate as to the proposed exchange. The Senate, however, "re-examined" the treaty, and advised, on March 9, 1829, the President to proceed to the exchange of ratifications, notwithstanding the expiration of the time stipulated.[2] Four other cases arose during Jackson's administration—in connection with the treaties signed: January 12, 1828, with Mexico; August 27, 1829, with Austria; May 7, 1830, with the Ottoman Porte; and May 16, 1832, with Chile—in each of which the Senate was called upon to consent to the exchange of ratifications. In the treaties with Mexico and Chile, additional articles extending the time were concluded and submitted to the Senate. This has been the usual procedure.[3] It happened in 1844 that the exchange of ratifications of the treaty of March 26, 1844, with the Grand Duchy of Hesse was

[1] *Ex. Journal*, vol. iii, pp. 242–4. [2] *Ibid.*, vol. iv, pp. 7, 9.
[3] *Ibid.*, vol. iv, pp. 146, 150, 151, 213, 237, 391.

effected twenty days after the period fixed by the treaty. President Tyler submitted the matter to the Senate. The Senate, by resolution, January 13, 1845, simply agreed to an extension of time, and declared that an exchange made prior thereto should be deemed and taken to have been regularly made.[1] On the exchange of ratifications, June 2, 1852, of a treaty with San Salvador signed January 2, 1850, which did not take place within the time specified, a proviso was signed declaring that the convention should not be binding until the Senate had sanctioned the exchange.[2] In order to effect the exchange of the ratifications of the recent reciprocity treaty with Cuba within the time stipulated, a constructive exchange was resorted to. On notification that the Cuban exchange copy had in good form been placed in transmission, the exchange copy of the United States was delivered to the Cuban minister in Washington, and a protocol signed reciting the fact of the exchange.

(b) *The President.*—Although treaty negotiations are conducted through the Secretary of State,[3] they originate legally with the President. Treaties are signed by the Secretary of State, as well as by other agents, and the ratifications are exchanged on the authority of powers

[1] *Ex. Journal*, vol. vi, pp. 363, 379.

[2] *Ibid.*, vol. viii, p. 437; vol. ix, p. 144.

[3] The Department of Foreign Affairs was established by the act of Congress of July 27, 1789. By the act of Sept. 15, 1789, the name was changed to Department of State. 1 *Stat. at L.*, 28, 68. Gouverneur Morris had introduced in the Federal Convention, Aug. 20, propositions providing for a Council of State in which there was to be a Secretary of Foreign Affairs, appointed at the pleasure of the President, to whom should be given, among other duties, the preparing of plans of treaties and the examining of such as might be transmitted from abroad. *Doc. Hist. of the Const.*, vol. iii, p. 566.

conferred by the President.[1] The power of ratification is not delegated.

As all treaties must receive this final ratification, the President may at will, so far as depends on his constitutional power, withhold from the Senate a treaty already negotiated. Of treaties thus withheld the Monroe–Pinckney treaty with Great Britain of December 31, 1806, a treaty with Mexico signed March 21, 1853, relative to a transit way across the Isthmus of Tehuantepec, an extradition convention with Colombia signed March 30, 1872, a convention with Switzerland signed February 14, 1885, for the protection of trade-marks, and the convention adopted in April, 1890, by the First International American Conference for the establishment of a tribunal of arbitration, are examples. Or the treaty may be submitted, accompanied with recommendations for amendments. President Pierce in submitting on February 10, 1854, the Gadsden treaty of December 30, 1853, recommended certain amendments.[2] President Cleveland in submitting, July 5, 1888, an extradition treaty signed May 7, 1888, with Colombia, called attention to changes suggested by the Secretary of State.[3] On December 16, 1845, President Polk communicated to the Senate an extradition treaty, signed January 29, 1845, with Prussia and certain other German states, and

[1] According to section 243 of the standing instructions to diplomatic officers of the United States, "a written international compact between a diplomatic representative of the United States and a foreign government" may, in case of urgent need, be made in the absence of specific instructions and powers: but it is to be expressly stated in the instrument that it is signed subject to the approval of the signer's government.

[2] Richardson's *Messages and Papers of the Presidents*, vol. v, p. 229.

[3] *Ibid.*, vol. viii, p. 615.

at the same time suggested a modification of Article III, in which it was stipulated, contrary to the rule then consistently maintained by the United States, that the contracting parties should not be bound to deliver up their own citizens. The Senate having failed to make the amendment in its resolution of June 21, 1848, advising the ratification, the President, for this as well as for other reasons, refused to ratify the treaty.[1]

So also treaties may be withdrawn from the consideration of the Senate either to effect changes by negotiation or to terminate proceedings on them. A treaty with Belgium, signed November 4, 1884, regulating the right of succession to and the acquisition of property, was withdrawn from the Senate by President Arthur by a message of February 17, 1885, and was not resubmitted.[2] President Cleveland in messages of March 13, 1885, and March 9, 1893, requested the return of treaties concluded by his predecessors—November 18, 1884, with Spain for commercial reciprocity; December 1, 1884, with Nicaragua relative to the construction of an interoceanic canal; December 4, 1884, with the Dominican Republic for commercial reciprocity; an article signed June 2, 1884, with the Argentine Confederation supplementary to the treaty of commerce of July 27, 1853; and the Hawaiian annexation treaty signed February 14, 1893.[3] President Roosevelt, in a message of

[1] *Ex. Journal*, vol. vii, pp. 7, 433. In his message to the Senate, July 28, explaining the reasons for his refusal to ratify, he laid special stress on the failure of the Senate to remedy Art. III, but added also as a sufficient justification the then recent reorganization of the German states. *Ibid.*, p. 462.

[2] *Ibid.*, vol. xxiv, p. 474.

[3] Richardson's *Messages and Papers of the Presidents*, vol. viii, p. 303; vol. ix, p. 393.

December 8, 1902, requested the return of a commercial convention with the Dominican Republic signed June 25, 1900, together with an additional article thereto, and a convention with Great Britain signed January 30, 1897, relative to the demarcation of the Alaskan boundaries. Instances of withdrawals for the purpose of making slight changes are quite numerous. The convention with Spain, signed August 7, 1882, supplementary to the extradition convention of January 5, 1877, was returned for verbal changes at the request of the Secretary of State made to the chairman of the Committee on Foreign Relations.[1]

3 AGREEMENTS CONCLUDED BY THE EXECUTIVE INDEPENDENTLY OF THE SENATE

On April 6, 1818, President Monroe submitted to the Senate an arrangement, terminable on six months' notice, reached with Great Britain by the exchange of notes, April 28 and 29, 1817, limiting the naval forces to be maintained on the Great Lakes. He asked the Senate to consider whether it was such an arrangement as the Executive was competent to enter into by the powers vested in him by the Constitution, or such an one as required the advice and consent of the Senate. The Senate by a resolution of April 16 (two-thirds the Senators present concurring) approved and consented to the arrangement and recommended "that the same be carried into effect by the President."[2] An act approved February 27, 1815, had authorized the President to cause all armed vessels on the lakes, except such as in his opinion were necessary for the execution of the revenue laws, to be dismantled and sold, or laid up;[3] and under

[1] *Ex. Journal*, vol. xxiii, p. 565. [2] *Ibid.*, vol. iii, pp. 132, 4.
[3] 3 *Stat. at L.*, 217.

the authority of this act he had, immediately upon the exchange of notes, and prior to any action by the Senate thereon, proceeded to give effect to the agreement.[1] President Buchanan, in submitting to the Senate, February 9, 1860, an agreement with Venezuela signed January 14, 1859, for the settlement of claims of citizens of the United States growing out of their expulsion by the Venezuelan authorities from the Aves Islands, observed that "Usually it is not deemed necessary to consult the Senate in regard to similar instruments relating to private claims of small amount when the aggrieved parties are satisfied with their terms." In the present case it was thought advisable on account of the instability of the Venezuelan government to give the agreement a formal ratification with the advice and consent of the Senate.[2] Claims conventions of this nature are not usually submitted to the Senate.[3]

[1] *House Doc. 471*, p. 14, 56th Cong. 1st Sess.

[2] *Ex. Journal*, vol. xi, p. 142.

[3] Of important agreements for the settlement of claims of American citizens against a foreign government, made and carried into effect without consultation with the Senate, the following examples may be noted: the agreement with Spain reached by exchange of notes Feb. 11 and 12, 1871, providing for a commission for the settlement of claims of citizens of the United States against Spain for injuries committed by Spanish authorities in Cuba; the protocol of Aug. 7, 1874, with Colombia for the settlement by arbitration of claims of citizens for the seizure of the Montijo; protocols with Hayti, May 28, 1884, May 24, 1888, and Oct. 18, 1899; with Brazil, Sept. 6, 1902; with the Dominican Republic, Jan. 31, 1903; with Chili, May 24, 1897; with Guatemala, Feb. 23, 1900; with Mexico, Mar. 2, 1897; with Nicaragua, Mar. 22, 1900; with Peru, May 17, 1898; with Salvador, Dec. 19, 1901; with Venezuela, Feb. 17, 1903; with Russia, Aug. 26, Sept. 8, 1900, submitting to arbitration the claims for the detention of American schooners by Russian cruisers; and the agreement with Mexico signed May 22, 1902, submitting to arbitration, in accordance with the provisions of The Hague Convention, the Pious Fund claim.

Protocols of agreement as to the basis of future negotiations are clearly within Executive authority. Such are, for instance, the protocols signed with Costa Rica and Nicaragua, December 1, 1900, in reference to possible future negotiations for the construction of an interoceanic canal by way of Lake Nicaragua. The most important agreement in this respect is the protocol with Spain of August 12, 1898, which constituted preliminary articles of peace. The final protocol signed at Peking, September 7, 1901, by the allied powers on the one hand, and by China on the other, at the conclusion of the Chinese troubles, likewise was not submitted to the Senate.[1] International relations ordinarily regulated by formal treaty stipulations have been temporarily regulated by Executive agreement. By exchange of memoranda in April-June, 1885, between Mr. Bayard, Secretary of State, and Sir Lionel West, British minister, a temporary extension was obtained of the privileges of American fishermen under the fisheries articles of the treaty of Washington, on the termination of these articles on July 1, 1885.[2] A *modus vivendi* limiting, for a period, the killing of fur seals in portions of Bering Sea was signed by Mr. Wharton, Acting Secretary of State, and Sir Julian Pauncefote, June 15, 1891, and proclaimed by the President the same day.[3] An agreement was reached, June 6, 1882, by Mr. Frelinghuysen, Secretary of State, and Señor Romero, the Mexican minister, providing for the reciprocal crossing and recrossing of the frontier by the troops of the United States and Mexico in pursuit of marauding Indians, which was successively prolonged until 1886.[4] A more formal agreement for the

[1] *For. Rel. 1901*, Appendix p. 312.
[2] *Ibid.*, *1885*, pp. 460–6.
[3] *Ibid.*, *1891*, p. 570.
[4] *Ibid.*, *1882*, pp. 419, 421, 426.

same purpose was entered into, June 4, 1896, by Mr. Olney and Señor Romero.[1] A protocol was signed at London, December 9, 1850, by Abbott Lawrence and Viscount Palmerston, and was approved by Mr. Webster, Secretary of State, January 17, 1851, by which such portion of Horse Shoe Reef in the Niagara river as might be requisite for a light-house was ceded to the United States, on condition that the United States would erect and maintain a light-house thereon.[2] The agreement as thus concluded was considered definitive, and an appropriation for its execution was made by Congress.[3] A *modus vivendi* was effected October 20, 1899, by exchange of notes between Mr. Hay, Secretary of State, and Mr. Tower, British chargé d'affaires at Washington, fixing a provisional boundary line between Alaska and the Dominion of Canada in the vicinity of Lynn Canal.[4]

4 AGREEMENTS REACHED BY VIRTUE OF AN ACT OF CONGRESS

(a) *Commerce and Navigation.*—The act of March 3, 1815, declared a repeal of discriminating duties against vessels, and products imported therein, of nations in which discriminating duties against the United States did not exist, the President to determine in each case by proclamation the application of the repeal.[5] The acts of January 7, 1824, and May 24, 1828, likewise authorized the President to suspend by proclamation discriminating duties so far as they affected the vessels

[1] *For. Rel. 1896*, p. 438. The Mexican minister was authorized by the Mexican Senate to enter into the agreement.

[2] *Treaties and Conventions*, pp. 444, 445.

[3] *House Doc. 471*, p. 17, 56th Cong. 1st Sess.

[4] *For. Rel. 1899*, pp. 328–330. [5] 3 *Stat. at L.*, 224, 792–5.

of a foreign nation, when possessed of satisfactory evidence that no such discriminating duties were imposed by that nation against the vessels of the United States.[1] Section 11 of the act of June 19, 1886, as amended by the act of April 4, 1888, vests similar power in the President.[2] A partial suspension is allowed by the act of July 24, 1897.[3] On the authority of these statutes numerous arrangements have been reached with foreign states and made operative by proclamation. The evidence accepted by the President as sufficient may be a note or despatch, or a memorandum of an agreement. The proclamations relative to abolishing discriminating duties on trade with Cuba and Porto Rico of February 14, 1884, October 27, 1886, and September 21, 1887, were based on memoranda of agreements signed with Spain, February 13, 1884, October 27, 1886, and September 21, 1887.[4]

Section 3 of the tariff act of October 1, 1890, authorized the President, whenever the government of any country, producing and exporting certain enumerated articles, imposed duties or other exactions on the products of the United States, which, in view of the free introduction of the enumerated articles into the United States, were in his opinion unreasonable or unequal, to suspend as to that country the privilege of free importation, and subject the articles in question to certain discriminating duties.[5] Ten commercial arrangements were concluded and made effective by means of this section—

[1] 4 *Stat. at L.*, 3, 308. [2] 24 *Stat. at L.*, 82. *For. Rel. 1888*, p. 1859.

[3] 30 *Stat. at L.*, 214. *Rev. Stat.*, sec. 4228.

[4] Richardson's *Messages and Papers of the Presidents*, vol. viii, pp. 223, 490, 570.

[5] 26 *Stat. at L.*, 612.

January 31, 1891, with Brazil; June 4, the Dominican Republic; June 16, Spain; December 30, Guatemala; January 30, 1892, Germany; February 1, Great Britain; March 11, Nicaragua; April 29, Honduras; May 25, Austria-Hungary; and November 29, Salvador. These were all terminated by section 71 of the tariff act of August 27, 1894.[1] Section 3 of the act of 1890 having been assailed as involving an unlawful delegation of legislative power, its constitutionality was sustained by the Supreme Court in the case of Field *vs.* Clark.[2] Section 3 of the act of July 24, 1897, not only provides, as did section 3 of the act of 1890, for the imposition by proclamation of certain differential rates, but also for the conclusion by the President of commercial agreements, with countries producing certain enumerated articles, in which concessions may be secured in favor of the products of the United States; and it further authorizes the President, when such concessions are, in his judgment, reciprocal and equivalent, to suspend by proclamation the collection on those articles of the regular duties imposed by the act, and subject them to special rates as provided in the section.[3] On the authority of this section the President has concluded and made effective the commercial agreements of May 28, 1898, with France; May 22, 1899, with Portugal (protocol making corrections signed January 11, 1900); July 10, 1900, with Germany; and February 8, 1900, with Italy.[4]

[1] *Sen. Doc. 52*, p. 2 *et. seq.*, 55th Cong., 1st Sess. The provision for free introduction was suspended by proclamation as to various countries.

[2] 143 U. S., 649.

[3] 30 *Stat. at L.*, 203.

[4] 30 *Stat. at L.*, 1774. *For. Rel.*, 1898, p. 292. 31 *Stat. at L.*, 1913, 1978, 1979. See for conventions for commercial reciprocity concluded in conformity with section 4 of the act, *infra*, p. 144.

(b) *International Copyright and Protection of Industrial Property.*—The international copyright convention signed at Berne, September 9, 1886, originally by ten states, has been acceded to by all the principal nations except Russia, Austria-Hungary and the United States. International copyright in the United States is regulated by the law of March 3, 1891, section 13 of which empowers the President to extend by proclamation the benefits of the law to citizens and subjects of a foreign state when assured that citizens of the United States are allowed the benefit of copyright in that state on substantially the same basis as its own citizens, or when the state is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which the United States may at its pleasure become a party.[1] Under the first alternative, the President has extended the benefits of the law by proclamation to subjects of Belgium, France, Great Britain and possessions, July 1, 1891; Germany, April 15, 1892; Italy, October 31, 1892; Denmark, May 8, 1893; Portugal, July 20, 1893; Spain, July 10, 1895; Mexico, February 27, 1896; Chili, May 25, 1896; Costa Rica, October 19, 1899; the Netherlands and possessions, Nov. 20, 1899; and Cuba, March 17, 1903.[2]

International protection of patents, trade-marks and commercial names is, however, regulated by treaty stipulations. The international convention for the protection of industrial property signed at Paris, March 20, 1883, was ratified by the President with the advice and consent of the Senate, March 29, 1887, and the ratifications were

[1] 26 *Stat. at L.*, 1110.

[2] The treaty with China signed Oct. 8, 1903, contains articles for the protection of trade-marks, patents, and copyrights in China.

communicated to the Swiss government on May 30 following. The ratification of the additional act, signed at Brussels, December 14, 1900, was deposited at Brussels, May 3, 1901.[1] Numerous special treaty stipulations for the protection of trade-marks have been concluded.[2] Under section 1 of the act of March 3, 1881,[3] which provides that owners of trade-marks domiciled in the United States "or located in any foreign country or tribes which by treaty, convention or law, affords similar privileges to citizens of the United States, may obtain registration of such trade-marks" by complying with certain designated requirements, two agreements have been reached by exchange of notes, February 10 and 16, 1883, with the Netherlands, and April 27 and May 14, 1883, with Switzerland.[4] A declaration for the reciprocal protection of trade-marks signed July 9–21, 1894, with the Greek government by Mr. Alexander, minister at Athens, was rejected by Mr. Gresham, who considered a formal convention to be submitted to the Senate to be necessary.[5]

(c) *International Postal and Money Order Regulations.* —Following the postal convention with Colombia of March 6, 1844, numerous other conventions of the same nature were concluded by the President and ratified with

[1] *Treaties and Conventions*, p. 1168. *Statutes 1902–3*, p. 163. The following countries are at present also parties to the convention, and have signed the additional act: Belgium, Brazil, Denmark, Dominican Republic, France, Great Britain, Italy, Japan, the Netherlands, Norway, Portugal, Serbia, Spain, Sweden, Switzerland and Tunis. The protection of the convention has been extended to numerous colonies and possessions of the different powers. *Sen. Doc. 20*, p. 6, 56th Cong. 2nd Sess.

[2] See for list, *ibid.*, pp. 40, 325–339. [3] *21 Stat. at L.*, 502.

[4] *Sen. Doc. 20*, pp. 334, 337, 56th Cong. 2nd Sess.

[5] *For. Rel. 1895*, pp. 759, 763, 765.

the consent of the Senate.[1] By the act of June 8, 1872, the Postmaster-General is given the power to enter into money-order agreements with the post departments of foreign governments, and by and with the advice and consent of the President, to negotiate and conclude postal conventions.[2] In virtue of this act, conventions of this class have been concluded by the Executive without submission to the Senate. Among these are the Universal Postal Conventions, signed at Vienna, July 4, 1891, and at Washington, June 15, 1897.[3]

(d) *Relations with Indian Tribes.*—From the first, our negotiations with the Indian tribes have been quite separate from those with foreign states. On July 12, 1775, three departments of Indian affairs—northern, southern and middle—were organized and the superintendence of each placed under commissioners.[4] By the general ordinance for the regulation of Indian affairs of August 7, 1786, two districts were organized, the superintendents of which were placed under the immediate control of the Secretary of War.[5] Treaties concluded through these agencies were transmitted to Congress for approval, publication and execution, but were not formally ratified.[6] In the act of August 7, 1789, for the organization of the war department under the Constitution, the conduct of Indian affairs was recognized as belonging to the Secretary of War. Later it was transferred to the department of the interior.[7] In the ap-

[1] *Ex. Journal*, vol. vi, p. 321; vol. viii, p. 17; vol. ix, p. 35; vol. xi, p. 563; vol. xii, pp. 116, 406.

[2] Sections 103 and 167, 17 *Stat. at L.*, 297, 304.

[3] 28 *Stat. at L.*, 1078. 30 *Stat. at L.*, 1629.

[4] *Journals of Congress*, vol. i, p. 162. [5] *Ibid.*, vol. x, p. 176.

[6] See *ibid.*, vol. x, pp. 195, 196; vol. xi, pp. 53, 55, 58, 61.

[7] 1 *Stat. at L.*, p. 50.

proval of the Indian treaties, submitted by President Washington to the Senate, May 25, 1789, for advice and consent—the first to be so submitted under the Constitution—the Senate simply advised the President "to execute and enjoin observance." The President in a message of September 17, objected to this form and suggested that he be advised to ratify as with other treaties. The committee appointed by the Senate to examine the question reported against a formal ratification, but the Senate complied with the suggestion by voting, September 22, to advise and consent to the ratification.[1] This procedure was followed until 1871, during which period the Indian treaties are far more numerous than those with foreign powers.[2] In the Indian appropriation act of March 3, 1871, it was enacted that thereafter no Indian nation or tribe within the territory of the United States should be acknowledged or recognized as an independent nation, tribe, or power with whom the United States might contract by treaty. The obligation of existing treaties was in no way to be impaired or invalidated by the act.[3] No formal treaties with the Indians have since been made, but agreements with them have been laid before Congress for its approval.

The peculiar status of the Indian tribes was happily defined, in 1831, by Chief Justice Marshall as that of "domestic dependent nations."[4] The Supreme Court has nevertheless ascribed the same sanctity to Indian treaties as to those with foreign powers, and has construed

[1] *Ex. Journal*, vol. i, pp. 25, 27, 28.

[2] Francis A. Walker, in *The Making of the Nation*, p. 106, states that prior to 1871, 382 Indian treaties had been concluded.

[3] 16 *Stat. at L.*, 566.

[4] The Cherokee Nation *vs.* Georgia, 5 Pet., 17.

the provision of the Constitution declaring "treaties made" to be the supreme law of the land, as being applicable to those concluded with Indian tribes.[1]

(*e*) *The Acquisition of Territory.*—Although territory has usually been acquired by formal treaty, it has, under special circumstances, been acquired under an act of Congress.[2] A treaty was signed at Washington, April 12, 1844, with the Republic of Texas, by which that republic conveyed and transferred to the United States all its rights of separate and independent sovereignty and jurisdiction. On June 8 the treaty was rejected by the Senate by a vote of 35 to 16.[3] Three resolutions introduced by Mr. Benton, May 13, and discussed regularly until the final vote on the treaty, possibly express the reasons for the rejection. They declare that the ratification of the treaty would be the adoption by the United States of the Texan war; that the treaty-making power of the President and Senate did not include the power of making war, either by declaration or by adoption; and that the territory disincumbered from the United States by the treaty of 1819 ought to be united to the American Union as soon as it could be done with the consent of a majority of the people of the United States and of Texas, and when Mexico should either consent to the transfer or acknowledge the independence of Texas, or cease to wage war against her on a scale commensurate with the conquest of the country.[4] While the last reason, which was political in its nature, was probably the most persuasive, the opinion that the ratification was tanta-

[1] Worcester *vs.* State of Georgia, 6 Pet., 559.

[2] The important acquisitions of 1803, 1819, 1848, 1853, 1867 and 1898 have been by means of formal treaties.

[3] *Ex. Journal*, vol. vi, p. 312. [4] *Ibid.*, p. 277.

mount to the adoption of a war with Mexico, and accordingly not within the province of the treaty-making power, was frequently expressed. In answer to an enquiry made by the Senate whether any military preparations had been made in anticipation of war, and if so for what cause and with whom was war apprehended, President Tyler stated in a message of May 15, 1844, that, in consequence of an announcement of Mexico declaring its determination to regard as a declaration of war the definitive ratification of the treaty of annexation, a portion of the naval and military forces had "as a precautionary measure" been assembled in the region of Texas. He observed further that the United States having by the treaty of annexation acquired a title to Texas, which required only the action of the Senate to perfect it, no other power could be permitted to invade and by force of arms possess itself of any portion of the territory of Texas, pending the deliberations of the Senate upon the treaty, without placing itself in a hostile attitude to the United States.[1] Immediately preceding the rejection of the treaty, a resolution was introduced by Mr. Henderson declaring that such annexation would be properly achieved on the part of the United States by an act of Congress admitting the people of Texas with defined boundaries as a new State into the Union on an equal footing with the other States.[2] This course was followed, and on March 1, 1845, a joint resolution was approved consenting to the erection of the territory, rightfully belonging to the republic of Texas, into a new State. A proviso, attached through the efforts of Mr. Benton, gave the President opportunity, before communicating the resolution to Texas, to resort to negotiations upon

[1] *Ex. Journal*, vol. vi, pp. 274, 276, 277, 279. [2] *Ibid.*, p. 311.

terms of admission and cession either by treaty to be submitted to the Senate or by articles to be submitted to both houses.[1] The purpose of the section was to effect if possible the acquisition and still maintain peaceful relations with Mexico.[2] Negotiations were not resorted to, and Texas having accepted and complied with the conditions of the resolution, was by the joint resolution of December 29, 1845,[3] admitted as a State into the Union.

A treaty was signed at Washington, June 16, 1897, with the Republic of Hawaii for its annexation to the United States. The treaty was ratified by the Hawaiian legislature, but the United States on its part accepted and confirmed the cession by a joint resolution approved July 7, 1898.[4] Although, as a matter of fact, the resolution was agreed to in the Senate, July 6, by a two-thirds vote (42 to 21),[5] the annexation was effected by an act of legislation, and not by an act of the treaty-making power. In 1845, a foreign state was admitted by a resolution of Congress as a State into the Union; in 1898, a foreign state was joined by a resolution of Congress to our territorial possessions. One feature, however, is common and furnishes precedent—the other contracting party in each case, by the very agreement, lost its identity as a nation with which international relations could exist, the agreement becoming immediately on its con-

[1] 5 *Stat. at L.*, 797.

[2] Benton, *Thirty Years in the United States Senate*, vol. ii, pp. 602, 619 *et seq.*

[3] 9 *Stat. at L.*, 108. Mr. Archer of the Committee on Foreign Relations submitted a report to the Senate, Feb. 4, 1845, objecting on constitutional grounds to this method of acquisition. *Compilation of Reports of Sen. Com. on For. Rel.*, pt. 6, p. 78.

[4] 30 *Stat. at L.*, 750.

[5] *Cong. Globe*, p. 6712, 55th Cong. 2nd Sess.

summation exclusively a matter of internal cognizance, and ultimately of unilateral construction.[1]

A recent agreement with Cuba signed by the President of the United States, February 23, 1903, for the leasing, subject to terms to be agreed upon by the two governments, of lands in Cuba for coaling and naval

[1] A still different case was presented in 1802. On April 24th of that year an agreement was entered into with the State of Georgia for the cession of western lands. The commissioners on the part of the United States, James Madison, Albert Gallatin and Levi Lincoln, were appointed by President Adams under an act of Congress, approved April 7, 1798. An act of May 10, 1800, vested final powers in the commissioners. On the part of Georgia the agreement was ratified and confirmed by the legislature, June 16, 1802. *House Mis. Doc. 45*, pt. 4, pp. 78–81, 47th Cong. 2nd Sess. As such a matter is at all stages during the negotiations, as well as after the conclusion of the agreement, exclusively an internal affair, such regulations doubtless fall properly within the powers of Congress. During the negotiations on the northeastern boundary in 1832, an agreement with the State of Maine for the cession to the government of the United States of the territory under dispute, and claimed by that State, east of the St. Francis river and north of the St. John, was signed. The agreement was never consummated; but in the fifth article of the Webster-Ashburton treaty the following clause was inserted: "the government of the United States agreeing with the States of Maine and Massachusetts to pay them the further sum of three hundred thousand dollars, in equal moieties, on account of their assent to the line of boundary described in this treaty, and in consideration of the conditions and equivalents received therefor from the government of Her Britannic Majesty." The irregularity of incorporating into an international treaty such a stipulation was not overlooked by the British negotiator. On the day of signing the treaty Lord Ashburton addressed a note to Mr. Webster, stating that the introduction of an agreement between the central and State governments would have been "irregular and inadmissible if it had not been deemed expedient to bring the whole of these transactions within the purview of the treaty." He requested an assurance that his government should incur no responsibility for these engagements. To this Mr. Webster replied on the same date: "It purports to contain no stipulation on the part of Great Britain nor is any responsibility supposed to be incurred by it on the part of your government." Moore, *Int. Arb.*, vol. i, p. 138. Webster's *Works*, vol. vi, pp. 289–290.

stations, was entered into in conformity with the provisions of the act of Congress, approved March 2, 1901. In defining the relations that should exist between the United States and Cuba, the act prescribed the condition that, to enable the United States to maintain the independence of Cuba and to protect the people thereof, the Cuban government should sell or lease to the United States lands necessary for coaling and naval stations at points "to be agreed upon with the President of the United States." Neither this agreement nor the protocol of July 2, 1903, in which the United States promised to pay annually, as long as it should occupy the areas designated, the sum of $2,000 in gold, was submitted to the Senate, although the latter was formally approved by the President and the ratifications exchanged. Numerous guano islands, which have been occupied by citizens of the United States, have been announced under the act of Congress of August 18, 1856, as "appertaining to the United States."[1]

5 AGREEMENTS ENTERED INTO BY INDIVIDUAL STATES OF THE UNION

By Article I, section 10, of the Constitution, the States are absolutely forbidden to enter into "any treaty, alliance or confederation," and, without the consent of Congress, to enter into "any agreement or compact with another State, or with a foreign power." Accordingly, whatever treaty-making power the States may exercise must always be with the consent of Congress. The exact distinction between the expressions "treaty, alliance or confederation" and "agreement or compact" has not been determined. Under the Articles of Con-

[1] 11 *Stat. at L.*, 119. See Jones *vs.* United States, 137 U. S., 202.

federation, the States were forbidden to enter, without the consent of Congress, into any "conference, agreement, alliance or treaty" with a foreign power, or into any "treaty, confederation or alliance" with another State. The latter expression is incorporated as the absolute prohibition in the Constitution. The proceedings of the Federal Convention give little light as to the intention of the framers. Madison, on June 19, observed that although the States had by the Articles of Confederation been forbidden to enter, without the consent of Congress, into treaties, Virginia and Maryland, in one instance, and Pennsylvania and New Jersey in another, had entered into "compacts without previous application or subsequent apology."[1] The same expressions that occur in the Constitution are found in the plan as reported, August 6, by the Committee of Detail.[2] A natural inference is that the expression "agreement or compact" was intended to comprehend such agreements as had been considered by the States under the Articles of Confederation as not included under "treaty, confederation or alliance." These embraced several boundary agreements besides the compact between Virginia and Maryland of March 28, 1785, which went so far as to stipulate for the regulation of port charges and dues.[3]

The prohibition of agreements between a State and a foreign power was the subject of an opinion given by Chief Justice Taney in 1840. The governor of Vermont had issued a warrant ordering a sheriff of that State to arrest one Holmes, a refugee from Canada, convey him to some convenient place on the boundary between the

[1] *Doc. Hist. of the Const.*, vol. iii, p. 155. [2] *Ibid.*, p. 455.

[3] See for list of such agreements, Poole *vs.* Fleeger, 11 Pet., 185; Wharton *vs.* Wise, 153 U. S., 163, 171.

State and the province of Lower Canada, and there deliver him to such persons as might be empowered by the Canadian authorities to receive him. All would admit, said Chief Justice Taney, that an agreement between Vermont and Canada formally made to deliver up offenders would be unconstitutional. As the surrender of the fugitive to the Canadian authorities was not the exercise of a power which operated only upon the internal concerns of the State, it was a part of the foreign intercourse of the country. The warrant of the governor authorized by State law was a State act. As no application by the governor of Canada for the arrest appeared in the record, it could not be assumed to have been made; but the warrant itself imported an agreement with the Canadian authorities. How, asked the Chief Justice, was the fugitive to be delivered unless they accepted him; and if the authorities of Vermont agreed to deliver him up, and the authorities of Canada agreed to accept, was not that an agreement between them? From the nature of the transaction the act of delivery necessarily implied a mutual agreement. It was mutually understood in some way that the fugitive should be seized, in order to be delivered up pursuant to this understanding. The terms "treaty," "agreement," and "compact," were not used superfluously, but indicated that the framers of the Constitution had intended to use the broadest and most comprehensive terms in order to cut off all connection or communication between a State and a foreign power. Accordingly, the term "agreement" must be so construed as "to prohibit every agreement written or verbal, formal or informal, positive or implied by the mutual understanding of the parties." The Chief Justice added that the States might, with the consent of Congress, and under its direct and specific supervision, enter into such

an agreement as that under consideration. The Court being equally divided on the return before it to the writ of *habeas corpus*, the case was dismissed. Justices Story, McLean, and Wayne concurred in the opinion delivered by the Chief Justice.[1] Holmes was subsequently discharged by the supreme court of Vermont. The record before that tribunal contained an application from the governor of Canada for the fugitive's surrender.

The prohibition has not been applied with the same comprehensiveness to agreements between States of the Union. In 1823, Mr. Clay argued before the Supreme Court that the consent of Congress being required to such agreements, it must be evidenced by some positive act, and that silence could not be interpreted into acquiescence; that it was not necessary for Congress to interpose in order to prevent that which without its consent would

[1] Holmes *vs.* Jennison, 14 Pet., 540, 561, 572, 573, 578. Moore, *Extradition*, vol. i, p. 57.

Examples of extradition by State authorities nevertheless may be found, most notably in New York under the law of 1822. In one instance, at least, the executive branch of the national government approved of the exercise of the power by the State. Case of De Witt, in 1841. See Mr. Webster to Gov. Seward, Sept. 16, 1841. Moore, *Extradition*, vol. i, p. 69. In 1872, however, the New York Court of Appeals declared the act of 1822 to be in conflict with the Constitution of the United States. People *vs.* Curtis, 50 New York, 329. In 1886, Mr. Justice Miller in giving the decision of the Supreme Court, that a person may be tried only for the offense for which he was extradited, took occasion to concur in the opinion expressed by Chief Justice Taney, and to declare the subject of extradition to be exclusively within the federal jurisdiction. United States *vs.* Rauscher, 119 United States, 407. Art. IX of the extradition treaty with Mexico signed Feb. 22, 1899, permits requisitions for fugitives that have committed crimes in the frontier States or Territories to be made either through the regular diplomatic officers, or through the chief civil authorities of the State or Territory or such other authority as may be designated by the chief executive of the State or Territory. Art. II of the treaty of Dec. 11, 1861, contained a similar provision.

be a mere nullity.[1] In the case before the Court, a compact had been formed between the State of Virginia and the people of Kentucky. By an act of the legislature of December 18, 1789, Virginia agreed to the separation of the Kentucky district under certain conditions, one of which was that the central government should, prior to a certain day, agree to the separation. The people of Kentucky in convention accepted the offer and incorporated the compact into their constitution. On February 4, 1791, Congress passed an act which after referring to the compact gave consent to the erection of the district into a separate State and its admission into the Union.[2] The Court held that the admission by Congress of Kentucky into the Union under a constitution in which the compact was incorporated, was not a mere tacit acquiescence but an express declaration of its consent.[3]

In 1871, a case came before the Court in which the consent of Congress was less explicit. The erection into a new State of certain western counties of Virginia, having been agreed to by the so-called Peirpoint Government, which was recognized by Congress as the true government of Virginia, the consent of Congress was given by the act admitting the State of West Virginia, December 13, 1862. Subsequently, in 1863, two counties of Virginia, Jefferson and Berkeley, with the concurrence of the two States, were joined to West Virginia; but before the passage, March 10, 1866, by Congress of the joint resolution specifically consenting to the transfer, the legislature of Virginia repealed the several acts by which her assent

[1] Green *vs.* Biddle, 8 Wheaton 40, 41.

[2] *Ibid.*, pp. 4, 86, 87.

[3] Likewise an agreement of nine articles between Kentucky and Tennessee signed Feb. 2, 1820, relative to boundaries, subsequently consented to by Congress, was upheld by the Supreme Court in 1837. Poole *vs.* Fleeger, 11 Pet. 209.

had been given to the erection of the new State and the separation of the two counties. Unless therefore Congress had given its consent before December 5, 1865, the date of the repeal by the Virginia legislature, there could be no valid agreement for the transfer of the two counties. It appeared, however, that in the acts of August 30, 1861, and May 13, 1862, of the Virginia legislature, consenting to the erection of certain designated counties into a separate State, consent was also given to the inclusion of Jefferson, Berkeley and other counties whenever the inhabitants should express a wish for it; and the constitution adopted by the new State, after naming the counties composing the State, provided that the additional counties should form a part of it, if by a majority vote their inhabitants should adopt the constitution. No vote was taken in these counties in 1862, at the time of the admission of West Virginia, but Congress then had the statutes of Virginia of 1861 and 1862 and the constitution of West Virginia under consideration. The Court therefore held that, although Congress did not expressly recite every proposition embraced in the agreement, yet the inference was clear that it intended to consent to the admission of the new State with the contingent boundaries provided for in the constitution and the statutes.[1]

In the case of Virginia *vs.* Tennessee, decided in 1893, the Court, Mr. Justice Field delivering the opinion, held that the consent of Congress might be implied from its subsequent legislation. A boundary line as run by commissioners appointed by the States of Virginia and Kentucky was by acts of the legislatures of the respective States, in 1803, "ratified, established and confirmed."

[1] Virginia *vs.* West Virginia, 11 Wall., 39, 60.

The line was recognized by Congress as the boundary in establishing judicial and revenue districts, and in federal elections and appointments. Such recognition in a single instance, said the Court, "would not perhaps be considered as absolute proof of the assent or approval of Congress to the boundary line; but the exercise of jurisdiction by Congress over the country as a part of Tennessee, on one side, and as a part of Virginia on the other, for a long succession of years without question or dispute from any quarter furnishes as conclusive proof of assent to it by that body as can usually be obtained from its most formal proceedings."[1] A safer procedure, however, was recently adopted by the States of Nebraska and South Dakota. On June 3, 1897, the governors of the two States, proceeding under acts of their legislatures, signed a compact providing for a boundary line in the Missouri. The compact was by express provision made subject to the consent of Congress, which was given by an act approved July 24, 1897.[2]

[1] 148 U. S., 503, 522.

[2] 30 *Stat. at L.*, 214. In giving the decision of the Court in the case of Virginia *vs.* Tennessee, Mr. Justice Field suggested possible cases of understandings between States which in his opinion were not prohibited by the terms "agreement" and "compact" of this section. Such would be, he said, a concerted plan for draining a common malarial or disease-producing district, or for preventing a sudden invasion of a plague or other causes of sickness; a contract by Massachusetts and New York for the transportation of exhibits for the World's Fair at Chicago over the Erie canal; the mere appointment of parties to run and designate a boundary line or to designate what line ought to be run; or a mutual declaration accepting a line as the true boundary, so far as it does not affect the political power or influence of the States concerned and thus encroach on the full and free exercise of federal authority. 148 U. S., 518–520.

6. THE EXECUTION OF TREATIES

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."—Article VI of the Constitution.

(a) *Affecting the Residuary Powers of the States*

The design of this article, so far as it relates to treaties, was primarily to insure their execution by the public authorities, State as well as national, in spite of any adverse State action. That this was accomplished, was fully established by the decision of the Supreme Court, in 1796, in the case of Ware *vs.* Hylton. In all the opinions of the judges, including the sole dissenting opinion by Mr. Justice Iredell, it is unanimously held that a treaty under the Constitution repeals *ipso facto* State laws inconsistent with it. Mr. Justice Chase said, without qualification, "It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual State, and their will alone is to decide. If a law of a State, contrary to a treaty, is not void, but voidable only by a repeal or nullification by a State legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the whole. * * * The constitution or laws of any of the States, so far as either of them shall be found contrary to that treaty, are, by force of said article, prostrated before the treaty." Mr. Justice Iredell, who had written in defense of this article in the discussions that

preceded the adoption of the Constitution, but who now dissented from the decision of the Court on the ground that the treaty did not affect rights already vested, likewise observed that under the Constitution, "so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigor of its own authority to be executed in fact. It would not otherwise be the supreme law in the new sense provided for, and it was so before in a moral sense."[1]

The supremacy of treaties over State legislation has since been drawn in question only when they relate to subjects not embraced in the powers delegated to the central government. Mr. Calhoun, as Secretary of State, in communicating to Mr. Wheaton, June 28, 1844, the unfavorable report of the Senate Committee on Foreign Relations on the proposed treaty with the German Zollverein, said "The treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers."[2] The tendency of the Supreme Court on the question is disclosed in its decisions on treaty stipulations defining the privileges of aliens in succeeding to and disposing of property located within the States, a matter, in the absence of a treaty, not within the province of the central government,[3] yet naturally subject to treaty regulation. By Article VII of the

[1] 3 Dallas, 199, 237, 277.

[2] Wharton's *International Law Digest*, vol. ii, p. 67.

[3] *Ibid.*, vol. ii, p. 69. 12 *Op. Att.-Gen.*, 6.

treaty with France of September 30, 1800, it was stipulated that citizens of the one country might dispose of or succeed to property, movable or immovable, in the other, without being obliged to obtain letters of naturalization. In 1817 the Court decided that this article overrode the limitations of a Maryland statute with which it conflicted.[1] Likewise in 1819 it was held that Article IX of the treaty with Great Britain of November 19, 1794, removed impediments to alien inheritance regardless of Virginia statutes to the contrary.[2] In 1879 the Court sustained these earlier decisions in a case that arose under the fifth article of the treaty with Switzerland of November 25, 1850. By this article alien heirs, if precluded from holding real estate in the particular State or canton, were permitted to dispose of the property, and to withdraw and export the proceeds without difficulty. In delivering the opinion of the Court—that the provision was within the treaty-making power under the Constitution, and must prevail over any conflicting statutes of Virginia—Mr. Justice Swayne observed: "If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.'"[3] The position of the Court was expressed not less clearly in the case of Geofroy *vs.* Riggs, 133 U. S., 258, which involved the right of French subjects residing in France to inherit real estate in the District of Columbia. It was necessary to decide as to the effect of Article VII of the treaty of 1800 with France upon the pre-existing laws of Maryland, in order

[1] Chirac *vs.* The Lessee of Chirac, 2 Wheat., 275. See also 10 Wheat., 181.

[2] Orr *vs.* Hodgeson, 4 Wheat., 464.

[3] Hauenstein *vs.* Lynham, 100 U. S., 483, 486, 490.

to determine what laws were in force in the District, Congress having on February 27, 1801, declared the Maryland laws to be in force there. Upon this point the Court held that the article by its terms suspended during the existence of the treaty the inconsistent common and statutory law of Maryland. "That the treaty power of the United States," said Mr. Justice Field, in delivering the opinion of the Court, "extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries." "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."[1] In an opinion given September 20, 1898, at the request of the Department of State, on the power of the United States to enter into treaty stipulations with

[1] Pp. 266–7.

Great Britain for the protection of the fisheries in waters along the international boundary line between the United States and Canada, Attorney-General Griggs advised that, although the waters which formed this boundary were on the American side within the territorial jurisdiction of the several riparian States, and Congress had no authority in the absence of a treaty to pass laws to regulate or protect fisheries within the territorial jurisdiction of the States, yet, as the regulation of fisheries had been frequently recognized as a proper subject for international agreement and in the present instance such an agreement was necessary for adequate regulation, the United States had power to enter into such stipulations.[1]

In a federal system of government, the sovereign body distributes the powers to be exercised by the central and by the local organs of government. It is the basic principle of such a system that this distribution as indicated in the supreme law should be recognized. It is equally true that in every sovereign nation power exists to exercise all the necessary functions of government. That it may be exercised, the power must be deposited in the one or the other, or in both of these organs of government. As by the Constitution of the United States, the entering into treaty engagements is forbidden the States, the necessary power resides either in the central organs alone, or in conjunction with the local. Against the latter alternative—the co-operation of the States—the utter failure of the practice under the Articles of Confederation, to remedy which was a prime motive in adopting the Constitution, will always stand as a warning. By Art. VII of the treaty of February 23, 1853, with France, the President of the United States engaged

[1] *22 Op. Att.-Gen.*, 215.

to recommend to the States of the Union, by whose laws aliens were not permitted to hold real estate, the passage of such laws as might be necessary to confer that right. What would be the ultimate result if the central government were obliged to resort to such a procedure? Few nations would enter into treaty stipulations with us guaranteeing such protection to American citizens in exchange for a promise on our part to recommend to a separate and independently acting body a similar protection. No assurance that the States would comply with the recommendation could be given. It follows that this nation would be practically incapable of entering into such agreements. To prevent this unfortunate result, the tendency of the Supreme Court has been to recognize as within the treaty-making power of the central government all those subjects which demand international regulation and are most properly the subject of negotiation with foreign powers. The presumption always is, that the sovereign body intended so to place a necessary power of government that it may be exercised.

The power of the central government to cede by treaty territory lying within the boundaries of a State, to which Mr. Justice Field in his opinion alludes, came under consideration in Washington's administration in connection with the Spanish negotiations relative to the boundary between Georgia and Florida. In the draft of instructions of March 18, 1792, to the American commissioners, Jefferson expressed the opinion that the right to alienate even an inch of such territory did not exist in the central government. In another part of the instructions, however, he admitted that, as the result of a disastrous war, necessity might compel an abandonment of

territory.[1] Hamilton was not prepared to place such a restraint on the power of the central government to accommodate itself to exigencies that might arise, especially as to unpeopled territory; the instructions remained unchanged.[2] In 1838, during the northeastern boundary controversy, the legislature of Massachusetts passed a resolution declaring that no power delegated to the central government by the Constitution authorized it to cede territory within the limits of States of the Union. In a confidential reply, April 17, to a personal request of Edward Everett, then governor of Massachusetts, for an opinion on the resolution, Mr. Justice Story said that he could not admit it to be universally true that the government of the United States was not authorized to make such cessions. He recalled that Chief Justice Marshall, when the question was under discussion some years before, "was unequivocally of opinion that the treaty-making power did extend to cases of cession of territory though he would not undertake to say that it could extend to all cases; yet he did not doubt it must be construed to extend to some."[3] Mr. Webster, however, in the final negotiations, for reasons which were not necessarily constitutional ones, sought to a certain extent the co-operation of the States of Maine and Massachusetts. Shortly after the arrival of Lord Ashburton, letters were addressed to the two States inviting the appointment of commissioners to confer with the central government as to

[1] *Am. State Papers For. Rel.*, vol. i, pp. 252, 255.

[2] *Writings of Jefferson* (Ford ed.), vol. v, pp. 443, 476. See opinions expressed in a cabinet meeting in Feb., 1793, on the proposition to cede territory to Indian tribes, *ibid.*, vol. i, p. 219.

[3] *Life and Letters of Joseph Story* (Wm. Story ed.), vol. ii, pp. 286, 288.

terms, conditions, considerations and equivalents, with an understanding that no line would be agreed upon without the assent of such commissioners.[1] Commissioners were accordingly appointed, and the final settlement was communicated to them for approval before the signing of the treaty.[2] The treaty was not strictly a determination of the actual line but a friendly adjustment of it, in which it was admitted that concessions had been made on the northeastern boundary in consideration of "conditions and equivalents" elsewhere. Speaking for the Court in the case of Fort Leavenworth R. R. Co. *vs.* Lowe, Mr. Justice Field expressed the opinion that before the cession to a foreign country "of sovereignty or political jurisdiction" over territory within a State the consent of the State was necessary; and likewise that the State was incompetent to make such cession without the concurrence of the central government. The case decided in this relation only that lands acquired by the central government in a State without the consent of the latter, were exempt from the legislative power of the State only when such lands were used as instrumentalities of the central government; and that lands acquired with the consent of the State for purposes specified in Article I, section 8, of the Constitution were entirely exempt from State legislation.[3] Mr. Justice White in his concurring opinion in the case of Downes *vs.* Bidwell was led to deny the "general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of." He admitted that "from the exigency of a calamitous war or the settle-

[1] Webster's *Works*, vol. vi, pp. 272–4.

[2] Moore, *International Arbitrations*, vol. i, p. 147.

[3] 114 U. S., 537, 539, 540.

ment of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress."[1]

In the consideration of this question a distinction must be made between territory organized into States and that still in Territorial form. Over the latter the national government exercises, subject to the express prohibitions of the Constitution, all the powers of government exercised over the former by the State and central governments combined. That the consent of the inhabitants of the territory to be ceded is necessary, would hardly be contended.[2] Accordingly the power to

[1] 182 U. S., 317.

[2] Hall (4th ed.), p. 48. It has nevertheless happened that as a matter of expediency, or through deference to the inhabitants of the territory to be ceded, the transfer has been made dependent upon such consent. A plebiscite of Savoy and Nice, under the treaty of Turin, of March 24, 1860, and of the Danish islands of St. Thomas and St. John, under the treaty of October 24, 1867, for their cession to the United States, was in each case taken. In the latter case, the government of the United States objected to the insertion of such a condition, but yielded in the end rather than break off the negotiations. The Danish government was at the time "intensely interested in the subject of a vote of the people of North Schleswig." By Art. V of the treaty of Prague of August 23, 1866, Austria transferred all her rights over Holstein and Schleswig to Prussia "with the condition" that Northern Schleswig should be ceded to Denmark, if by a free vote the population expressed a wish to be united to Denmark. Much to the disappointment of Denmark and the North Schleswigians such a vote was not taken. See *Reports of the Sen. Com. on For. Rel.*, vol. viii, pp. 169, 176, 198. The retrocession in the treaty of August 10, 1877, by Sweden to France, of the island of St. Bartholomew, was made dependent upon a vote of the inhabitants. The annexations of 1860, by the Kingdom of Sardinia, of the various Italian states in which the plebiscite was taken are hardly applicable, in that, not only was there no governmental organization sufficiently established in the several states with which to treat, but also it was in each case a question not of a cession of a portion of the state's territory, but of state annihilation.

cede such territory, if it exists as a power of government in the United States, must reside in the organs of the central government. Chief Justice Marshall, in upholding, in 1828, the power of the central government to acquire territory by treaty said, "The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[1] The power to cede outlying territory is a no less essential attribute of the full treaty-making power of the United States, which "extends to all the proper subjects of negotiation between our government and the governments of other nations,"[2] than the power to acquire. As to territory within a State, over which the central government has only concurrent jurisdiction, the question is entirely different, and its decision need not be anticipated. A treaty for the determination of a disputed line operates not as a treaty of cession but of recognition. For this purpose it has not infrequently been found expedient to resort to a court of arbitration, in which the localities affected are sometimes afforded an opportunity to be heard.

(b) *Involving Congressional Legislation.*

During the debate in the House of Representatives on the Jay treaty, Chief Justice Ellsworth, in a written opinion communicated to Jonathan Trumbull, March 13, 1796, said, "The instant the President and Senate have made a treaty, the Constitution makes it a law of the land; and of course, all persons and bodies

[1] American Insurance Company *vs.* Canter, 1 Pet., 542.

[2] See *supra*, p. 109.

in whatever station or department within the jurisdiction of the United States are bound to conform their actions and proceedings to it. Such a treaty *ipso facto* repeals all existing laws so far as they interfere with it."[1] Chief Justice Marshall, in 1801, in the case of the United States *vs.* Schooner Peggy,[2] declared that treaties according to the Constitution of the United States became with their conclusion binding on the courts and as such affected parties litigating. In 1829, just forty years after the Constitution went into operation, the same great judge, after noting the contractual nature of a treaty and its usual dependence for infraterritorial operation upon subsequent acts of the respective parties, said, "In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."[3] That a treaty may repeal a prior act of Congress, has been frequently affirmed in individual opinions both of the justices of the Supreme Court and of the attorneys-general. Mr. Justice Harlan, in the recent case of the United States *vs.* Lee Yen Tai,[4] while holding the treaty of March 17, 1894, with China, and the act of May 5, 1892, relative to judicial procedure in the deportation of Chinese laborers, to be not inconsistent, observed, "That it was competent for the two countries by treaty to have superseded a prior act of Congress on the same subject, is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme

[1] *MSS. Letters to Washington*, vol. cxvii, p. 287.
[2] 1 Cranch, 109.
[3] Foster and Elam *vs.* Neilson, 2 Pet., 314, 315.
[4] 185 U. S., 220.

law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior act of Congress on the same subject."

But, as was observed by Chief Justice Marshall in Foster *vs.* Neilson, not all treaties become fully effective as laws *proprio vigore.* Some may require legislative execution. In Article VIII of the treaty of February 22, 1819, which was before the Court in this case, it was stipulated, according to the English text, which was alone considered in the decision, that all grants of land made by his Catholic Majesty in the ceded territory prior to January 24, 1818, "shall be ratified and confirmed to the persons in possession of the lands." The language, the Chief Justice observed, indicated merely a contract in which the United States engaged to do a particular act and until Congress had confirmed the grants, the courts were not at liberty to disregard the existing laws on the subject; that as such a stipulation addressed itself to the political not the judicial department, the legislature must execute the contract before it could bind the courts. He added, had the words "are hereby confirmed" been used, the article would have been self-executing and have repealed acts of Congress repugnant to it.[1] So also Mr. Justice Field in the case of Whitney *vs.* Robertson observed that "When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect * * * If the treaty contains

[1] Only one other justice considered this point essential to the decision. 2 Pet., 313. In the later case of U. S. *vs.* Percheman, 7 Pet., 51, 89, the Court, construing the English and the Spanish text together, held that the article was self-executing.

stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment."[1] In order to determine what treaty provisions require legislative execution, it is necessary to resort to legislative precedents, as the promptness with which Congress has usually met these obligations has quite removed the question from judicial determination.

On April 14, 1792, an act, which had been passed at the suggestion of President Washington, was approved, to carry into effect the consular convention with France of November 14, 1788, the first treaty to be ratified under the Constitution. It did little more than designate the judges and marshals, whose duty it should be to render assistance to French subjects and French consuls according to the tenor of the treaty. The act was principally concerned with the duties of American consular officers abroad.[2]

Appropriations.—Jefferson records under date of April 9, 1792, a meeting with President Washington, in which questions for consultation with the Senate on the proposed Algerian treaty were considered. It having been suggested by Jefferson that the seal should not be put to the treaty until the two houses had voted the money which was to be paid to Algiers, the President asked whether if such a treaty were ratified by him with the consent of the Senate it would not be valid under the Constitution, and obligatory on the representatives to furnish the money. Jefferson replied that "it certainly would, and that it would be the duty of the representa-

[1] 124 U. S., 194. See opinion of Mr. Justice Baldwin in Lessee of Pollard's Heirs *vs.* Kibbe, 14 Pet., 415 (1840).

[2] 1 *Stat. at L.*, 254.

tives to raise the money; but that they might decline to do what was their duty * * * it might be incautious to commit himself by a ratification with a foreign nation, where he might be left in the lurch in the execution; it was possible, too, to conceive a treaty which it would not be their duty to provide for." The President did not favor the precaution, and declared that if the representatives "would not do what the Constitution called on them to do, the government would be at an end, and must then assume another form."[1]

On February 29, 1796, the Jay treaty was proclaimed by President Washington, the ratifications having been exchanged October 28 of the previous year, and on March 1 it was communicated to Congress for its information. The treaty, while not expressly so stipulating, required an expenditure of money in the organization of the mixed commissions therein provided for. It met with disfavor in the House, and on March 24 a resolution introduced by Edward Livingston was passed (62 to 37), requesting the President to communicate to that body the instructions and other documents relative to the negotiation of the treaty.[2] Fully appreciating the importance of the reply as a precedent, President Washington informed the committee, Livingston and Gallatin, appointed to present the resolution, that he would consider the matter; and according to his usual practice on important questions he requested the opinions in writing of the members of the cabinet. He also wrote to Hamilton for his advice. The members of the cabinet were unanimous in denying the right of the House to

[1] *Writings of Jefferson* (Ford ed.), vol. i, p. 191. *MSS. Jefferson Papers*, series 4, vol. ii, no. 36.

[2] *Annals*, 4th Cong., 1st Sess., pp. 759, 760.

insist on the request, and in asserting the exclusive power of the President and Senate to make treaties on all the usual subjects of negotiation with foreign states, maintaining that treaties thus concluded were legally binding on all bodies of men within the jurisdiction of the United States. Chief Justice Ellsworth, whose appointment to the Supreme Court bears the date of March 4, 1796, expressed in a lengthy letter under date of March 13 similar views. He opened his argument with the statement that the treaty-making power as vested by the Constitution in the President and Senate went to all kinds of treaties, for no exception was expressed and no treaty-making power was elsewhere granted to others, and it was not to be supposed that the Constitution had omitted to vest sufficient power to make all kinds of treaties which had been usually made, or which the existence or interests of the nation might require. That an appropriation which was necessary to carry the treaty into effect was an accidental circumstance, and did not give the House any more right to examine into the expediency of the treaty or control its operation than it would have without that circumstance. "Their obligation to appropriate the requisite sums," so he concluded, "does not result from any opinion they may have of the expediency of the treaty, but from their knowledge of its being a treaty, an authorized and perfect compact which binds the nation and its Representatives. The obligation is indispensable, as it is to appropriate for the President's salary, or that of the Judges, or in any other cases where fidelity to the Constitution does not leave an option to refuse."[1] Hamilton advised against compliance in a letter of March 26, and three days later submitted a

[1] *MSS. Letters to Washington*, vol. cxvii, p. 287.

draft of a message in reply. President Washington had, however, already decided to refuse the request, and his message, prepared with the assistance of the cabinet, was in final form before the arrival of Hamilton's. He accordingly reserved the latter's draft, "as a source for reasoning," should, as was expected, a fresh demand be made.[1] The message, as communicated March 30, concluded with an unqualified refusal in the following words: "As therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light . . . a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request."[2] In reaching this conclusion President Washington made several observations on the mode of making treaties under the Constitution. He spoke with more confidence of the purpose of the treaty-making provision, having been a member of the Convention that framed it and an observer of the proceedings of the State conventions that adopted it. He recalled that a proposition that no treaty should be binding which was not ratified by law had been proposed and had received explicit rejection in the Convention. He had ever entertained but one opinion on this subject, which from the establishment of the government until the present had been acquiesced in by the House—that the power of making treaties was exclusively vested in the President

[1] *Writings of Washington* (Ford ed.), vol. xiii, p. 181. *Works of Hamilton* (Lodge ed.), vol. viii, pp. 386, 389.

[2] Richardson's *Messages*, vol. i, p. 196.

and Senate, and that every treaty so made and promulgated, thenceforward became the law of the land.[1]

With reference to this message, the House, by a resolution passed April 7, by a vote of 57 to 35, disclaimed any agency in the making of treaties, but asserted that in case a treaty contained stipulations on any of the subjects submitted by the Constitution to Congress, it must depend for its execution as to such stipulations on a law to be passed by Congress; and that it was "the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect."[2] As expositions of this view, the opinions of Jefferson and Gallatin may be taken. That of the former as expressed in a letter to Monroe, March 21, 1796, was, in effect, that although the President and Senate had the general power of making treaties, yet whenever they included matters confided by the Constitution to the three branches of the legislature, a legislative act was necessary to "confirm" those articles, and the House of

[1] As appears by the *Washington Papers*, the reply was made after careful investigation. Extracts from the proceedings of the Federal Convention, relating to the making of treaties, are found. Mr. Pickering made an investigation of the previous practice of the administration and was convinced that the instances in which appropriations, relative to the treaties with certain Indian tribes and the Barbary States, had been made before their conclusion, were not applicable, since the money in these cases had been a necessary antecedent to their negotiation. Although few if any thoughts in the message are not found in the drafts submitted by the cabinet officers, the sagacity with which the selections were made bears witness none the less to the ability of him with whose authority the message was stamped. A draft in Pickering's handwriting, which appears, however, to have been prepared after full consultation with the President, contains practically the concise expressions of the final message. *MSS. Letters to Washington*, vol. cxvii, pp. 312, 314.

[2] *Annals*, 4th Cong., 1st Sess., pp. 771, 782.

Representatives as one branch was perfectly free to refuse, when in its judgment the good of the people would not be served by letting the treaty go into effect.[1] Gallatin in his speech before the House on March 9, argued that if any specific power was given by the Constitution to a branch of the government, it limited the general power, and so far as the powers clashed the branch holding the specific power must concur in order to give validity to the act; that the power to make treaties was a general power, while the power to make appropriations, together with other legislative powers, was specifically given to Congress. If this power of making treaties as vested in the President and Senate were unlimited, then the Executive might, under color of a treaty, entirely eliminate the House from legislation by substituting a foreign nation or some petty Indian tribe. If treaties, whatever their provisions, were laws, why not have inserted another article in the treaty itself appropriating the necessary sums and thus have dispensed altogether with the action of the House on it? Unless, he contended, it were allowed that either the power of the House over the purse-strings was a check, or that the existing laws could not be repealed by a treaty, or that the special powers granted to Congress limited the general power of treaty-making, there were no bounds to it.[2]

In support of the action of the administration the opinions of Oliver Wolcott, Secretary of the Treasury, and Alexander Hamilton, are the most interesting, excepting always the message itself. The written opinion of the former bears date of March 26. By a historical review

[1] *Writings* (Ford ed.), vol. vii, p. 67. See also *ibid.*, pp. 38, 40, 41.

[2] *Annals*, 4th Cong., 1st Sess., pp. 464, 467.

he reached the conclusion that the people of this country at the time of the adoption of the Constitution entertained the opinion, as expressed in the Federal Letter, that the power of making treaties vested in Congress under the Articles of Confederation was capable of controlling the legislative powers, which then existed in the United States, *i. e.*, in the several States. That embarrassments having been experienced in consequence of the non-execution of the treaty of peace, the convention which framed the Constitution must have intended such an organization and deposit of the power of making treaties as would render its exercise at once safe and efficacious. The great object of that part of the Constitution which defined the legislative power was to fix the limits of jurisdiction between the general and State governments, rather than to distribute power between the departments of the central government. In the specification of the executive powers, found in Article II of the Constitution, that of making treaties, subject to the control or negative voice of the Senate, was expressly mentioned. Treaties were compacts between sovereign states, originating in free consent and deriving their obligations from the plighted faith. The Constitution expressly committed to the President and Senate the power to pledge the faith of the nation; and said Wolcott, "the obligations arising from *public faith* when pledged by the representative organ of our nation *in all foreign concerns*, agreeably to the mode prescribed by the Constitution, are justly and properly declared to be *laws*—the *legislative power* is bound not to contravene them, on the contrary, it is bound to regard and give them effect." If to omit the exercise of the power committed to any branch of the government would be to annul a treaty, such an omission would be a violation of the Constitution in that branch

which refused to act. On the question whether a treaty could repeal an act of Congress, he observed that, since the power of making peace could not be exercised by treaty without repealing the act declaring war, the power of making treaties of this most simple form implied of necessity the power of repealing a pre-existing law. To the question, if treaties possessed the power of repealing laws, what were the limits which restrained the President and Senate from absorbing all the powers of the legislature, he answered that the power of making treaties must necessarily be indefinite, "it must be allowed to be competent to the adjustment of every dispute with a foreign nation under any circumstances." That the power was indefinite was no proof that it was not fully vested solely in the President and Senate. That it was capable of abuse was no argument that the House possessed a controlling authority. Many of the powers vested in Congress were likewise indefinite with no restraints except the virtue and discretion of Congress. That Congress might raise and equip armies and navies for purposes of ambition, or tax unwisely, was no proof that the power was not vested in it. Statutes and treaties of the United States were alike supreme laws of the land, and the last act of whichever description would control. He, however, added as a qualification, "It is not intended to assert that treaties can extend to every object of legislation, there is no doubt that the forms of the Constitution and the powers of the different departments and organs of government are superior to the influence of a treaty; the limitation of the power of making treaties may in some respects be difficult, as the exigencies of society cannot be foreseen, but in respect to matters of mere *internal concern*, there appears to be nothing upon which the power of making treaties can

operate, in derogation or extension of the power of legislation."[1]

The reasoning of Hamilton, as expressed in letters written at the time and in his draft of a message, was that the Constitution empowered the President and Senate to make treaties; that to make a treaty as between nations meant to conclude a contract obligatory on their good faith; that a contract could not be obligatory to the validity or obligation of which the assent of another power in the state was constitutionally necessary; that the Constitution declared a treaty made under the authority of the United States to be a supreme law, but that that could not be a supreme law to the validity or obligation of which the assent of another power in the state was constitutionally necessary; that whatever coloring might be given a right of discretionary assent to a contract, it was a right to participate in the making of it; and hence that a discretionary right in the House to assent to a treaty or, what was equivalent, to execute it, would negative two important provisions of the Constitution—that the President and Senate should have the power to make treaties and that the treaties so made should be laws. It was, he contended, one thing, that a treaty pledging the faith of the nation should by force of moral duty oblige the legislative will to carry it into effect, quite another that it should be itself a law. The latter was the case under the Constitution. There were no express limits to the treaty-making power, and it was a reasonable presumption that it was meant to extend to all treaties usual among nations and so to be commensurate with the variety of exegencies and objects of intercourse which might occur between nation and nation.

[1] *MSS. Letters to Washington*, vol. cxvii, p. 293.

Treaties of peace, alliance and commerce were usual among nations. Treaties of peace frequently included indemnification, pecuniary or otherwise. Treaties of alliance necessarily stipulated for the union of forces, and the furnishing of pecuniary and other aids. Treaties of commerce regulated the "external commerce" of the nation. Unless the treaty power could embrace objects upon which the legislative power might also act it was often inadequate for mere treaties of peace, and always so for treaties of alliance and of commerce. The action of the House was not always deliberative in making appropriations; as, for instance, in making an appropriation to defray the expense of an office created by the Constitution or a prior act of Congress. It was discretionary only when the Constitution and laws placed it under no command or prohibition. There was, however, this difference between the obligation of the Constitution and of laws, the former enjoined obedience always, the latter, till annulled by the proper authority. While it was true the Constitution provided no method of compelling the legislative body to act, it was, nevertheless, under a constitutional legal and moral obligation to act where action was prescribed. If the legislative power was competent to repeal this law by a subsequent law, it must be by the whole legislative power, not by the mere refusal of one branch to give effect to it. A legal discretion to refuse the execution of a pre-existing law was virtually a power to repeal it. "Hence," he said, "it follows that the House of Representatives have no moral power to refuse the execution of a treaty which is not contrary to the Constitution, because it pledges the public faith; and have no legal power to refuse its execution because it is a law—until at least it ceases to be a law

by a regular act of revocation of the competent authority."[1]

On April 30 by the close vote of 51 to 48 the House resolved that provision ought to be made by law for carrying the treaty into effect, and on May 6 three acts were approved making appropriations for the execution of the treaties with Great Britain, Spain and Algiers respectively.[2]

The question has since been raised, but little has been added to the arguments of 1796. Jefferson had in Washington's administration advised consulting the House in the matter of the appropriation before entering into the Algerian negotiations, on the ground that whenever the agency of either or both houses would be requisite to carry a treaty into effect, it would be prudent to consult them previously if the occasion admitted.[3] Consistently with this opinion, before opening the negotiations of 1803 for the purchase of lands at the mouth of the Mississippi, he asked Congress for a provisional appropriation of two millions for the purpose; and he considered the act making the appropriation as conveying the sanction of Congress to the acquisition proposed.[4] Quite unexpectedly and without instructions the commissioners entered into a treaty for the purchase of the entire Louisiana territory, for which the provisional appropriation was entirely inadequate. In the treaty of 1803 a large expenditure was expressly promised, while in the treaty of 1794 it was incidental.

[1] *MSS. Letters to Washington*, vol. cxvii, p. 323. *Works of Hamilton* (Lodge ed.), vol. vii, p. 118; (J. C. Hamilton ed.), vol. vi, pp. 92, 94; vol. vii, pp. 556–570.

[2] *Annals*, p. 1291. 1 *Stat. at L.*, 459, 460.

[3] *MSS. Jefferson Papers*, Series 4, vol. ii, nos. 18, 36.

[4] *Annals*, 8th Cong., 1st sess., p. 12.

President Jefferson thought of submiting the treaty to both houses of Congress, and drafted his message accordingly. In their written suggestions on the draft, both Madison, the Secretary of the State, and Gallatin, the Secretary of the Treasury, who in 1796 had been leaders of the opposition in the House, advised against this procedure—the former observing that "the theory of our Constitution does not seem to admit the influence of deliberations and anticipations of the House of Representatives on a treaty depending in the Senate;" the latter, that the House of Representatives "neither can nor ought to act on the treaty until after it is a treaty." Mr. Gallatin argued further that at times it might be necessary to obtain a grant of money before opening negotiations, but that in the present case, as the negotiations had been closed, no necessity existed to consult or communicate with the House until the instrument had been completed by the President's ratification, and that there was no apparent object in this instance for the communication, unless it was supposed that the House might act, or in other words express its opinion and give its advice, on the inchoate instrument which would, at the same time, be constitutionally before the Senate.[1] Conformably to these suggestions the treaty was communicated October 17 to the Senate only, but the House was informed by the annual message of the same date that the treaty would, as soon as the sanction of the Senate had been received, be communicated to it for the exercise of its "function as to those conditions" which were within the powers vested by the Constitution in Con-

[1] *MSS. Jefferson Papers*, series 3, vol. viii, no. 83; and vol. iv, no. 129. See also *Writings of Jefferson* (Ford ed.), vol. viii, p. 266; *Writings of Gallatin* (Adams ed.), vol. i, p. 156.

gress.[1] The treaty having been ratified and the ratifications exchanged October 21, was communicated to Congress for consideration in its legislative capacity, the President observing in his message that some important conditions could "be carried into execution, but with the aid of the Legislature."[2]

To claim that the House has a free and discretionary right to grant or refuse an appropriation for the execution of a treaty, and at the same time deny the Executive the right to submit for its approval the treaty until fully ratified, produces a situation which in a government devoid of parliamentary responsibility may easily prove embarrassing. The Federalists were now in the opposition. By those who in 1796 had opposed the call for the papers, a resolution was now supported requesting the President to communicate such parts of the correspondence and papers as would tend to prove the validity of the French title to the ceded territory. When charged with inconsistency, Roger Griswold of Connecticut replied that the papers were wished for the purpose of legislating correctly, and that he still held that when a treaty was once ratified it was the duty of every department of the government to carry it into effect. The Republicans found less plausible defense against a similar charge. By a not strictly party vote of 59 to 57 the resolution was defeated.[3]

A position, which differed in some respects from that taken in 1796, was taken by the House in 1868, on the Alaskan treaty. President Johnson communicated the treaty to Congress July 6, 1867, subsequently to its pro-

[1] *Annals*, 8th Cong., 1st sess., p. 11. [2] *Ibid*,, pp. 17, 18.

[3] *Ibid.*, pp. 385, 403, 419. The House was composed of 102 Republicans and 39 Federalists. Adams, *History of the United States*, vol. ii, p. 95.

clamation June 20, calling the attention of Congress to the required appropriation.[1] In considering the bill reported by the House Committee on Foreign Affairs to fulfill the stipulation of the treaty, the House, on July 14, inserted, by a vote of 98 to 49 (53 not voting), an amendment which read in part: "Whereas the subjects thus embraced in the stipulations [for the payment to Russia of $7,200,000, and for the admission of certain of the inhabitants of the ceded territory to the enjoyment of the privileges and immunities of citizens of the United States] of said treaty are among the subjects which by the Constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress should be given to said stipulation before the same can have full force and effect; having taken into consideration the said treaty, and approving of the stipulations therein, to the end that the same may be carried into effect * * * Be it enacted, That the assent of Congress is hereby given to the stipulations of said treaty."[2] At the same time that this amendment was inserted, another which declared that thereafter no territory should be purchased until provision for its payment had been made by law, and that the powers vested by the Constitution in the President and Senate to enter into treaties with foreign governments did not "include the power to complete the purchase of foreign territory before the necessary appropriation" had been made by an act of Congress, was defeated by a vote of 80 to 78 (42 not voting). On the persistent refusal of the Senate to accept the bill as passed by the House,

[1] Richardson's *Messages*, vol. vi, p. 524.

[2] *House Journal*, 40th Cong., 2d sess., p. 1064.

conference committees were appointed. As agreed to in conference, and finally passed by the two houses, the bill, after reciting that the treaty had been entered into by the President and its ratification advised and consented to by the Senate, and that the stipulations for the payment of the money and the admission of certain of the inhabitants could not be "carried into full force and effect except by legislation to which the consent" of both houses of Congress was necessary, simply authorized the appropriation.[1] The substitution of this non-committal resolution for the resolution of the House, which had been passed by an impressive vote, supports the view that the conferrees of the Senate obtained the advantage. It is accepted on both sides, nor has it ever been questioned, that a treaty stipulating for an appropriation of money can be fully carried into effect only by an act of Congress.

That Congress is under no obligation to make the stipulated appropriation has not been seriously advanced by the House since 1868, although individual advocates of this view have not been wanting. Such an opinion was expressed by John Randolph Tucker in his able and elaborate report from the House Committee on the Judiciary, occasioned by the signing December 6, 1884, of a convention extending the period of the Hawaiian reciprocity treaty.[2] Mr. Justice McLean in circuit in 1852 expressed a similar opinion, observing that in such a case "the representatives of the people and the States exercise their own judgments in granting or withholding the money," and that the treaty-making power "cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know,

[1] 15 *Stat. at L.*, 198. [2] *House Report*, 4177, 49th Cong., 2d sess.

that so far as the treaty stipulates to pay money, the legislative sanction is required."[1] To these opinions may be opposed the directly conflicting utterances of other eminent jurists such as Kent and Duer.[2] The Supreme Court has yet to express an opinion on the question. Mr. Justice Brown in the case of De Lima *vs.* Bidwell remarked: "We express no opinion as to whether Congress is bound to appropriate the money * * * it is not necessary to consider it in this case as Congress made prompt appropriation of the money stipulated in the treaty."[3]

Whatever may be individual opinions on the question, this much appears: Under the Articles of Confederation the control of the purse-strings resided in the States, while that of making treaties was vested in the Congress. It was the expressed sentiment of the statesmen just prior to the adoption of the Constitution that treaty stipulations entered into by the Congress, although they touched upon subjects within State control, were obligatory on the legislatures of the several States. To render this obligation an unavoidable constitutional obligation was a great purpose of the Constitution. The intention of those who adopted the Constitution as indicated by the records of that period was to vest the treaty-making power efficaciously in the President and Senate; and such intention finds direct expression in the Constitution, and confirmation in repeated decisions of the Supreme Court. Stipulations involving expressly or tacitly, immediately or ultimately, an expenditure, although the sums involved may not form a material item

[1] Turner *vs.* Am. Baptist and Missionary Society, 5 McLean, 347.

[2] See Wharton's *International Law Digest*, vol. ii, p. 23.

[3] 182 U. S., 198.

in the total expenditures of the government, are most common. For instance, the recent treaty referring to a joint commission the Alaskan boundary dispute, while not expressly stipulating for an expenditure, required an immediate special appropriation of $100,000. To admit the necessity of the concurrence of the House in all such treaties is to admit that body to an agency in the making of a large proportion of treaties concluded, and deny the efficacy of the treaty-making power as organized in the Constitution.

It may be further observed that in the first instance in which a stipulation expressly required an appropriation of a considerable amount, a precedent was intentionally established by the first defenders of the rights of the House in this respect, of withholding the treaty until it had been fully ratified and the ratifications exchanged. If the concurrence of the House is necessary to the validity of the stipulation, its action should precede the final ratification; for the execution of a treaty cannot be with safety begun on our part, or requested of the other contracting power, if its validity is still dependent upon the action of an independent legislative body. The inter-relation of stipulations usually prevents their separation, so that the failure to confirm one of them would operate as the rejection of the entire instrument. The House early conceded, however, that it had no claim to an agency in the making of the treaty, but only a free action as to the execution of it. Yet, if the House has no agency in the making of the treaty, its action is not essential to the validity of the treaty. For the House to disclaim any agency in the making of the international compact, but at the same time to deny any obligation to execute it, is to recognize another organ of government as competent to

bind the nation, but at the same time to except itself from the obligation. More important than its own disclaimer, is the practice of the government. The approval by Congress of a preliminary appropriation has never been considered necessary to give validity to the proceedings under a convention by which disputed claims have been submitted to a tribunal of arbitration. President Jefferson before opening the negotiations of 1803 for the purchase of Louisiana, and of 1806 for the purchase of Florida, and President Polk before opening the Mexican negotiations, obtained provisional appropriations. The act of Congress of June 28, 1902, made a provisional appropriation for the acquisition by treaty of the right to construct an inter-oceanic canal. In the treaty with Denmark of April 11, 1857, for the abolition of the Sound Dues, it was provided that the treaty should take effect as soon as the stipulated sum had been tendered by the United States, or received by Denmark. These are exceptions. The practice has been to proceed to the ratification on the authority of the Senate alone, and the treaty thus ratified has been recognized both by this and foreign governments as valid and definitively concluded, and Congress has never failed to vote the required appropriation.

Modifications of the Revenue Laws.—Of the treaty stipulations relative to commerce and navigation, that preceded the treaty with Great Britain of July 3, 1815, two provisions require notice in an examination of Congressional action, Art. III of the Jay treaty, proclaimed February 29, 1796, and Art. VII of the treaty with France, proclaimed October 21, 1803. The former provided reciprocally on the part of the United States that British subjects might freely pass by land or inland navigation the boundary line between the territories of the

two nations; that all goods and merchandise, the importation of which should not be wholly prohibited, might be brought in this manner by British subjects into the United States; and that articles thus imported should be subject to no higher or other duties than would be payable by the citizens of the United States on the same articles if imported in American vessels into the Atlantic ports of the United States. The existing tonnage and revenue laws imposed a discriminating duty of ten per cent. on goods imported in other than American vessels, and no such exemptions as were contained in the treaty were provided for.[1] Section 104 of the revenue act of March 2, 1799, "for the purpose of conforming this act to certain stipulations contained in treaties made and ratified under the authority of the United States," recited in substance this provision of the treaty and enacted it as a part of the law.[2] It does not appear whether the article was considered as self-operative prior to this act and the section inserted simply to exempt it from repeal, or whether the section was designed to give it effect.[3] In Article VII of the treaty of 1803, it was stipulated that for a period of twelve years French ships coming directly from France or her colonies, and Spanish ships from Spain or her colonies, should be admitted

[1] See 1 *Stat. at L.*, 411.

[2] 1 *Stat. at L.*, 701.

[3] Jefferson, in a cabinet meeting, July 29, 1790, took the position with respect to a proposed Indian treaty, that a treaty made by the President, with the concurrence of two-thirds of the Senate, would repeal past laws and legally control the duty acts, but could not itself be repealed by future laws. This was, however, he later wrote, a first impression which subsequent investigation proved to be erroneous. *Writings* (Ford ed.), vol. v, pp. 215, 216. Edmund Randolph expressed the opinion in cabinet, November 21, 1793, that an act of the legislature would be necessary to confirm treaties affecting the tariff duties. *Ibid.*, vol. i, p. 268.

into all the legal ports of entry in the ceded territory on the same terms of duty and tonnage as American ships coming from the same ports. The act of February 24, 1804, extending certain of the revenue laws of the United States to the new territory, specifically enacted in section 8 this provision of the treaty.[1]

In the treaty with Great Britain signed July 3, and proclaimed December 22, 1815, it is stipulated on the part of the United States, that no higher duties shall be imposed in ports of the United States on British vessels and articles imported therein, produced or manufactured in His Britannic Majesty's territories in Europe, than are payable by American vessels. President Madison in his message of December 23, notifying Congress of the proclamation of the treaty, recommended "such legislative provisions" as the convention might call for on the part of the United States.[2] Although the treaty provision came in direct conflict with the general revenue and tonnage laws, a special act of March 3, 1815,[3] had repealed discriminating duties so far as they affected any foreign nation which, to the satisfaction of the President, had abolished its laws that operated to the disadvantage of the United States. Mr. Calhoun, in the debates following the recommendation of the President, observed that whatever might be the *ipso facto* effect of the treaty on existing legislation, this act made quite unnecessary any further legislation to execute the treaty, since no better evidence could be furnished the Executive than a treaty

[1] 2 *Stat. at L.*, 253. See similar provision in act of March 3, 1821, extending "subject to the modification stipulated" in Article XV of the treaty of February 22, 1819, revenue laws to Florida. 3 *Stat. at L.*, 639.

[2] *Annals*, 14th Cong., 1st sess., p. 29. [3] 3 *Stat. at L.*, 224.

guarantee.[1] This view, which is sanctioned by subsequent practice, seems obviously sound, but it was not acted upon at the time. Bills were introduced in each house agreeably to the President's recommendation, but differing radically. The bill "concerning the convention," as adopted without opposition by the Senate, January 10, 1816, simply declared that so much of any acts as might be contrary to the provisions of the convention should "be deemed and taken to be of no effect." It assumed the repeal by the treaty itself, the declaration being made to remove doubts in this respect should any arise.[2] On the other hand, the bill as passed by the House, January 13, by a vote of 86 to 71, entitled "An act to regulate the commerce between the United States and the territories of His Britannic Majesty according to the convention," assumed the incompatible laws to be in full force, and enacted in detail the necessary modifications.[3] The debates and divisions in the House are of unusual interest since they were confined to the constitutional question involved and were quite free from party and sectional influences.[4] As neither body would agree to the bill as passed by the other, a conference committee was resorted to. The conferrees of the Senate, Rufus King, James Barbour and W. W. Bibb, admitted the doctrine that some treaties made in pursuance of the Constitution might "call for legislative provisions to secure their execution, which provision Congress, in all such cases, is bound to make;" but contended that in the present case no such legislation was necessary, and that

[1] *Annals*, 14th Cong., 1st sess., p. 526.

[2] *Ibid.*, pp. 36, 40, 46. [3] *Ibid.*, pp. 419, 674.

[4] The Senate of the fourteenth Congress was composed of 24 Republicans and 12 Federalists; the House, of 117 Republicans and 65 Federalists.

even a declaratory act added nothing to the efficacy of the treaty but served simply to remove any possible doubt. The report does not indicate what class of treaties, in the opinion of the Senate conferrees, required Congressional legislation to secure their execution. Mr. Forsyth, however, in his report for the House conferrees —William Lowndes, Henry St. George Tucker and himself—observed that it was believed that the Senate acknowledged that legislative enactments were necessary to carry into execution all treaties which contained "stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory; if indeed this power exists in the government at all."[1] The bill as agreed to reads, "Be it enacted and declared by the Senate and House of Representatives of the United States in Congress assembled, That so much of any act as imposes a higher duty of tonnage, or of impost on vessels and articles imported in vessels of Great Britain, than on vessels and articles imported in vessels of the United States, contrary" to the convention of July 3, 1815, "be from and after the date of the ratification of said convention and during the continuance thereof deemed and taken to be of no force and effect."[2] The act is clearly a compromise. The insertion of the words "and declared" after "enacted" seemed to the Senate conferrees most essential, as it indicated the effective force of the treaty itself in the repeal. To this the conferrees of the House yielded, believing that these words were "mere surplusage not changing the character, or impairing the force of the legislative act." The latter insisted on a law enacting a repeal of any law not

[1] *Annals*, 14th Cong., 1st sess., p. 1019. [2] 3 *Stat. at L.*, 255.

in accord with the treaty. To this the former agreed provided no precedent should be established which should bind them thereafter to assist in passing laws in cases on which "such doubts might not exist."[1] It may be observed that in his report, Mr. Forsyth, who was the leader in the contention of the House, declared it safer in all doubtful cases to provide by legislation for the execution than to "endanger the public faith by a failure to perform the provisions of a treaty" which had received a constitutional ratification, thus admitting by implication that the faith of the nation was pledged in such cases regardless of the action of Congress.[2]

The act of May 15, 1820, imposed a duty of eighteen dollars per ton on French vessels entering the United States.[3] By the convention with France signed June 24, 1822, and proclaimed February 12, 1823, it was stipulated on the part of the United States that a duty not exceeding three dollars and seventy-five cents per ton, in excess of the duty paid by American vessels importing French products, should be imposed on such products imported in French vessels. The treaty was on February 20, 1823, communicated to the House to the end, that "the necessary measures for carrying it into execution" might be adopted.[4] The act of March 3, 1823, for this purpose, repealed all acts incompatible with the execution of the treaty, specifically mentioning the act of May 15, 1820; and enacted that French vessels should pay the additional duty of three dollars and seventy-five cents according to the tenor of the convention.[5] Article VII of the treaty with France signed July 4, 1831, and

[1] *Annals*, 14th Cong., 1st sess., p. 1022. [2] *Ibid.*, p. 1020.
[3] 3 *Stat. at L.*, 605. [4] *Am. State Papers, For. Rel.*, vol. v, p. 222.
[5] 3 *Stat. at L.*, 747.

proclaimed July 13, 1832, provided that the United States should, on and after the exchange of ratifications, impose duties upon French wines not to exceed the rates enumerated therein, which were less than those then existing.[1] Section 10 of the act of July 13, 1832, expressly enacted that the rates specified in the treaty should be charged on French wines, the law to have a retroactive effect on importations made since February 2, the date of the exchange of ratifications.[2] The article in question had met with opposition in the Senate. Mr. Clay, on February 8, 1832, subsequently to the vote advising ratification, introduced a resolution declaring that the Senate did not intend that the article should "be taken and held as a precedent in the future exercise of the treaty-making power." The resolution was tabled.[3]

In submitting to the Senate on April 29, 1844, the reciprocity treaty with the German Zollverein, negotiated by Mr. Wheaton, President Tyler observed that, inasmuch as the treaty conflicted to some extent with existing laws, it was his intention, should the Senate consent to its ratification, to communicate a copy of it to the House of Representatives in order that such action might be taken by that body as should be deemed necessary to give effect to its provisions.[4] On June 14, Rufus Choate, from the Committee on Foreign Relations reported against the ratification. Without refer-

[1] See act of May 24, 1828. 4 *Stat. at L.*, 309.

[2] 4 *Stat. at L.*, 576. Attorney-General Cushing, in an opinion given February 16, 1854, says that these wines became chargeable with the lower duty with the exchange of ratifications on February 2, 1832, as provided in the treaty, regardless of the pre-existing acts. 6 *Op.*, 295. See the view expressed by Attorney-General Miller, April 5, 1889, as to Hawaiian reciprocity treaty, 19 *Op.*, 277.

[3] *Ex. Journal*, vol. iv, p. 209. [4] *Ex. Journal*, vol. vi, p. 262.

ence to the particular merits of the treaty, the committee was not prepared, he said, "to sanction so large an innovation upon ancient and uniform practice in respect of the *department of government* by which duties on imports shall be imposed. The convention which has been submitted to the Senate changes duties which have been laid by law. It changes them either *ex directo* and by its own vigor, or it engages the faith of the nation and the faith of the legislature through which this nation acts to make the change." "In the judgment of the committee the legislature is the department of government by which commerce should be regulated and laws of revenue be passed."[1] The report of Mr. Archer, from the same committee, February 26, 1845, occasioned by a message from the President urging action on the treaty, reaffirmed this position, and the treaty remained unratified.[2]

A decade later, June 5, 1854, a treaty of similar character was signed with Great Britain relative to Canada, stipulating for the free introduction into the United States of certain products. Article V specifically provided that the treaty should take effect as soon as the laws required to carry it into effect should be passed by the Imperial Parliament of Great Britian and the local parliaments of the British colonies affected on the one hand, and by the Congress of the United States on the other. The act of Congress of August 5, 1854, to give effect to the treaty, went into a specific enumeration of the products, corresponding with those named in the treaty, to be exempt from the existing tariff rates.[3] Likewise, in each of the two treaties of similar character

[1] *Reports of Senate Com. on For. Rel.*, vol. viii, p. 36. [2] *Ibid.*, p. 38.
[3] 10 *Stat. at L.*, 587.

which have been subsequently concluded (excluding the recent treaty with Cuba), the treaty with Great Britain of May 8, 1871, Articles XVIII, XXV, and Article XXX, and the convention with Hawaii of January 30, 1875, a clause was inserted making the operation of the treaty contingent upon the action of Congress in passing laws to carry it into effect.[1] The respective acts for this purpose, approved March 1, 1873, and August 15, 1876, enacted rather than declared the stipulated modification of the laws.[2] In the reciprocity convention with Mexico signed January 20, 1883, and the ratifications of which were exchanged May 20, 1884, a provision was inserted that it should not take effect until the "laws necessary to carry it into operation" had been passed by the Congress of the United States, and by the government of Mexico, but it was also stipulated that such legislation should take place within twelve months from the date of the exchange of ratifications.[3] Although the time was extended by subsequent agreements, Congress failed to enact the necessary legislation, and the convention remained ineffective. In the unratified reciprocity treaties signed July 20, 1855, and May 21, 1867, with the Hawaiian Islands;[4] November 18, 1884, with Spain, relative to Cuba and Porto Rico;[5] and December 4, 1884, with the Dominican Republic,[6] provisions were inserted making their operation contingent upon action of Congress. Although no such reservation is found in the Kasson treaties as negotiated, an

[1] Art. XXXIII and Art. V, respectively.

[2] 17 *Stat. at L.*, 482, and 19 *Stat. at L.*, 200.

[3] Art. VIII. [4] Art. IV. [5] Art. XXVI.

[6] Art. XVI. See also Art. XVI of the unratified convention of February 15, 1888, with Great Britain.

amendment to each, that it shall not take effect until approved by Congress, has been proposed by the Senate Committee on Foreign Relations. To the recent treaty with Cuba, which, as negotiated, likewise contained no such specific clause, the Senate attached such an amendment.[1] In order to make the legislative approval as broad as the convention, a clause was inserted in the act declaring that during the continuance of the convention no sugar of any other foreign country should "be admitted by treaty or convention into the United States" at a lower rate of duty than that specified in the tariff act of July 24, 1897. To prevent the implication from this clause, that the duties might be modified by treaty or convention, a saving clause was inserted, declaring that nothing in the act should be construed as an admission on the part of the House that customs duties could be changed otherwise than by an act of Congress originating in the House.

Section 4 of the tariff act of July 24, 1897, to which the Senate as a branch of the legislature has agreed, provides that whenever within the period of two years treaties modifying within defined limits, the rates fixed by the act shall be negotiated, and "shall have been duly ratified by the Senate and approved by Congress, and

[1]The President, in his message of November 10, in which he urged the enactment by Congress of the legislation "which by the terms of the treaty" was necessary to render it operative, after having pointed out clearly the moral obligation of the United States to make to Cuba the concessions of the treaty (resulting especially from the latter's acceptance of the limitations, financial and otherwise, contained in the Platt amendments, and from the granting to the United States of naval stations), and after having observed that in view of these considerations the treaty had been made and its ratification advised by the Senate, said, "A failure to enact such legislation would come perilously near a repudiation of the pledged faith of the nation."

public proclamation made accordingly," duties shall be collected as provided and specified in the treaty.[1]

From this historical review it appears that whatever may be the *ipso facto* effect of treaty stipulations, entered into by the President and Senate, upon prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, their execution by Congress; that in case of proposed extensive modifications a clause has been inserted in the treaty by which its operation is expressly made dependent upon the action of Congress; and that in the recent Cuban treaty such a clause was inserted on the initiative of the Senate. The contention, that, because a treaty may repeal prior acts of Congress, this legislative execution by Congress is mere surplusage, must start with the hypothesis that the President and Senate would not in such cases be acting *ultra vires*. On January 26, 1880, the House passed a resolution which declared that the negotiation by the executive department of the government of commercial treaties whereby the rates of duty to be imposed on foreign goods entering the United States for consumption should be fixed, "would, in view of the provision of section 7 of Article I of the Constitution of the United States, be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives."[2] It cannot be overlooked that the exclusive power of originating bills for raising revenue was given to the House by the framers of the Constitution in lieu of an exclusive power of originating all bills for raising or appropriating money, as proposed in the draft of the

[1] 30 *Stat. at L.*, 204.

[2] *House Journal*, 46th Cong., 2d sess., p. 323.

Constitution reported August 6 by the Committee of Detail.[1]

In a dissenting opinion in the case of Dooley *vs.* United States,[2] as also in a concurring opinion in the case of Downes *vs.* Bidwell,[3] Mr. Justice White took occasion to object to the decision of the Court in De Lima *vs.* Bidwell—that Porto Rico ceased with the exchange of the ratifications of the treaty with Spain, independently of any legislative action, to be foreign territory as that word was used in the revenue laws—on the ground that, if it were carried out to its logical result the President and Senate might by treaty materially affect the revenue laws, as, for instance, by the acquisition and incorporation of a country producing in large quantities articles from the importation of which, under the existing tariff, the revenues of the government were chiefly derived. Mr. Justice Field, in the case of Bartram *vs.* Robertson, in construing the most-favored nation stipulations in Articles I and IV of the treaty of April 26, 1826, with Denmark, in connection with the special concessions in the Hawaiian treaty of January 30, 1875, observed: "Those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration."[4] In the following year, 1888, Article IX of the treaty of February 8, 1867, with the Dominican Republic, granting most-favored nation treatment, came before the Court. Mr. Justice Field, in again delivering the opinion of the Court, not only held that the construction of the most-favored nation provision in the treaty with Den-

[1] *Doc. Hist. of Const.*, vol. iii, p. 445.
[2] 182 U. S., 241.
[3] 182 U. S., 313.
[4] 122 U. S., 116 (1887).

mark was entirely applicable to Article IX of the Dominican treaty, the case before the Court therefore being covered by the decision in Bartram *vs.* Robertson, but he also found "another and complete answer" in the fact that the act of Congress under which the duties were collected was of general application and made no exception in favor of goods coming from any particular country, and being of later date than the treaty, if there was any conflict between the two, the law must control.[1] It is true that the law under which the duties were collected was approved July 14, 1870 (amended December 22, 1870),[2] while the treaty with the Dominican Republic was concluded February 8, 1867. Yet the treaty with the Hawaiian Islands, the benefit of whose concessions was claimed, was not signed until January 30, 1875, and did not become operative until September 9, 1876, in virtue of an act of Congress. Prior to this date no obligation to extend to Santo Domingo the tariff modifications stipulated in the Hawaiian treaty could under any construction arise; nor before that time could the stipulations of the Dominican treaty, so far as concerns those modifications, operate as municipal law and consequently be subject to legislative repeal. Assuming that the construction of Article IX admitted such an obligation (and this may be assumed if this second answer is to be taken as "complete"), it would be difficult to reconcile the contention, that treaty stipulations are so far self-executing as to effect a repeal of inconsistent revenue laws, with the statement of the learned justice in this case, that he found no exception in the revenue law in favor of the Dominican Republic.

Extradition and Other Conventions.—The only treaty

[1] Whitney *vs.* Robertson, 124 U. S., 190. [2] 16 *Stat. at L.*, 262, 397.

provision for the extradition of fugitives from justice that preceded the Webster-Ashburton treaty of 1842 is found in Article XXVII of the Jay treaty. Requisition for the delivery of a refugee in virtue of this article was made by the British government in 1799. This was complied with by President Adams, although no legislation had been passed by Congress for its execution. In the attempt in the House to censure the President for his action, while the interference of the Executive in the duties of the judicial branch of the government was the principal ground of accusation, the power of the President to act under the article of the treaty without legislative direction was questioned. To Mr. Gallatin's request to be informed "on what rule or law the President had acted," John Marshall, in his famous speech of March 7, 1800, replied, "The treaty, stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of Congress making the same declarations."[1] On the final vote on the resolutions of censure, the action of the President was sustained.[2] The extradition provisions of the treaty of August 9, 1842, with Great Britain, and of the treaty and additional article with France signed November 9, 1843, and February 24, 1845, respectively, were, prior to Congressional action, recognized as laws by different justices in the lower courts. In dismissing for want of jurisdiction a case that came before the Supreme Court under the treaty with France, Mr. Justice McLean declared the treaty provision to have the force of a law of the land.[3] The act of August 12, 1848, which is em-

[1] *Annals*, 6th Cong., pp. 587, 614. [2] *Ibid.*, p. 619.

[3] *In re* Metzger, 5 How., 188; Moore, *Extradition*, vol. i, p. 100. Butler, *Treaty-Making Power of the United States*, vol. ii, pp. 81, 256.

bodied in the Revised Statutes, sections 5270–5280, provides for carrying into effect not only past treaties, but those made in the future. Section 5280, embodying the acts of March 2, 1829, and February 24, 1855, relates to the restoration of deserting seamen. Prior to the act of 1829 clauses for this purpose were inserted in numerous conventions,[1] but with the exception of the two conventions with France[2] it does not appear that any act of Congress was passed to carry these provisions into effect.

Attorney-General Miller advised, April 5, 1889, that Article II of the international convention for the protection of industrial property signed at Paris, March 20, 1883, and proclaimed by the President, June 11, 1887, which provided that the citizens of each contracting state should enjoy in all the other states the advantages in protection of patents, trade-marks and commercial names, accorded or that should thereafter be accorded to their citizens or subjects, was, in so far as it was at variance with the existing laws of the United States, without force and effect; that it was not self-executing, but required legislation to render it effective for the modification of the laws.[3] An act was approved March 3, 1903, to carry into effect the additional industrial

[1] These include the conventions concluded: November 14, 1788, with France; February 22, 1819, with Spain; June 24, 1822, with France; October 3, 1824, with Colombia; December 5, 1825, with Central America; July 4, 1827, with Sweden and Norway; May 1, 1828, with Prussia; June 4, 1828, with the Hanseatic Republics, and December 12, 1828, with Brazil. See Tucker *vs.* Alexandroff, 183 U. S., 424, 461.

[2] See acts of April 14, 1792, 1 *Stat. at L.*, 254, and May 4, 1826, 4 *Stat. at L.*, 160.

[3] 19 *Op.*, 273. See for résumé of laws passed by Congress, as well as bills prepared, to carry into effect the various treaty stipulations for the reciprocal protection of trade-marks and commercial names, *Senate Doc.*, 20, p. 92 *et seq.*, 56th Cong., 2d sess.

property convention signed at Brussels, December 14, 1900.[1] In the Trade-mark Cases, the Supreme Court, while declaring the acts of Congress of 1870 and 1876 to encroach on the powers of the States, said, "we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect."[2]

Although conflicting opinions were expressed by the different justices in the Insular cases as to the extent to which a treaty may incorporate foreign territory, this much appears to have been decided—that the territory becomes by force of the treaty, without the aid of legislation, so far appurtenant to the Unted States as to be excluded from the term "foreign" as used in the revenue laws.

Not infrequently a treaty, though forming a part of the supreme law, may, in order to be fully effective, require legislation to supplement it and regulate the details of its enforcement.

[1] 32 *Stat. at L.*, 1225. [2] 100 U. S., 99.

PART II

FOREIGN STATES

Great Britain

The power to conclude treaties is in Great Britain a prerogative of the Crown, exercised on the advice of a responsible minister. Before the full development of the present parliamentary system of government, the liability to impeachment of those associated with the King in the negotiations served as the principal check.[1] At present, while the means of redress are no greater, the fact that the minister, through whom the treaty must be concluded, possesses the confidence of the Commons, renders the exercise of the power more secure.[2]

[1] The House of Commons brought charges of impeachment against the Earls of Portland and Oxford, and Lords Somers and Halifax for their part in the Second Treaty of Partition (1700). Gerard, *Peace of Utrecht*, p. 67. The eleventh article of the impeachment of Lord Clarendon charged him with having effected the sale of Dunkirk to the French King. Hallam, *Constitutional History of England* (2d ed.), vol. ii, p. 498. So also a principal charge in the impeachment of Lord Danby was his connection with the secret treaty of May 27, 1678, between Charles II and Louis of France, by which the former agreed, for a pecuniary compensation, to remain neutral in the contest with the Dutch. *Ibid.*, p. 553.

[2] "The prerogative of the Crown in this respect [foreign relations] is exercised, subject always to the collective advice of the Cabinet, through one of Her Majesty's Principal Secretaries of State, to whom is entrusted the business of communicating with representatives of foreign states in this country, and with our own representatives in other commu-

Treaties that involve a charge on the people, or a change in the law of the land, can be carried into effect only by an act of Parliament.[1] In treaties for the guarantee of loans, and thus potentially involving the finances, it is the practice to engage only to recommend to Parliament the guarantee, or to ask Parliament for authority to guarantee. Thus in the convention with France, Greece and Russia of March 29, 1898, to facilitate a Greek loan, it was stipulated that "The Governments of France, Great Britain and Russia undertake to guarantee jointly and severally, or to apply to their parliaments for authority to guarantee."[2] Such authority was on due application given by the British Parliament by an act of April 1, 1898, prior to the deposit of the ratification at Paris on May 18. The act not only provided in detail for the eventual execution of the convention, but enacted that Her Majesty might guarantee as stipulated in the treaty.[3] Similar provisions are found in the conventions signed: May 7, 1832, June 27, 1855, June 3, 1856, and March 18, 1885, relative to Greek, Turkish, Sardinian and Egyptian loans, respectively; and April 30, 1868, to facilitate a loan for the completion of the improvements on the Danube.[4]

nities." Anson, *Law and Custom of the Constitution*, vol. ii, p. 273. Of the organization of the Foreign Office, the same author says: "The Secretary of State for Foreign Affairs is assisted by two Under Secretaries of State, one of whom is political, the other permanent; two assistant Under Secretaries, a Librarian, a head of the Treaty Department and a staff of clerks."

[1] *Ibid.*, vol. ii, p. 279.

[2] Article IX. *British and Foreign State Papers*, vol. xc, p. 28.

[3] 61 *Vict.*, c. 4.

[4] Articles XII, I, VII and I, respectively. *British and Foreign State Papers*, vol. xix, p. 37; vol. xlv, p. 18; vol. xlvi, p. 238; vol. lxxvi, p. 349; vol. lviii, p. 9.

As to commercial treaties that require a change in the law of the land, Parliament manifested a tendency to assert an independent agency in their execution as early as 1713. The commercial treaty of Utrecht with France provided that, as between the two countries, the most-favored-nation treatment should be observed; that all laws made in Great Britain since 1664 for prohibiting the importation of any goods coming from France should be repealed; and that within two months a law should be passed providing that no higher customs duties should be paid on goods imported from France than on those brought from any other country.[1] A bill to make effectual these articles, introduced into the Commons in June, 1713, was after an extended debate voted down.[2] Article XX of the important commercial treaty with France of January 23, 1860, provided that the treaty should not be valid unless Her Britannic Majesty should be authorized by the assent of Parliament to execute its engagements.[3] Such a provision is usually inserted in treaties which stipulate for an immediate modification of the existing revenue laws. By Article II of a commercial convention with Spain, signed April 26, 1886, the British Government agreed to apply to Parliament for authority to make certain alterations in the scale of duties imposed on imported Spanish wines. The convention, which otherwise only guaranteed most-favored-nation treatment, was "drawn up subject to the sanction of the legislatures" of the two countries.[4] In a commercial agreement of three articles with Greece, signed March

[1] Articles VIII and IX. *Collection of Treatys*, vol. iii, p. 446.

[2] *Parliamentary History*, vol. vi, p. 1223.

[3] *Brit. and For. State Papers*, vol. l, p. 26.

[4] Art. III. *Ibid.*, vol. lxxvii, p. 49.

28, 1890, Her Britannic Majesty engaged to recommend to Parliament a reduction of 5s. per cwt. in the duty on imported currants.[1] In the important general treaties of commerce and navigation, which stipulate on the part of Great Britain for most-favored-nation treatment rather than for special tariff concessions, concluded December 5, 1876, with Austria-Hungary, July 23, 1862, with Belgium, May 30, 1865, with Germany, June 15, 1883, with Italy, July 16, 1894, with Japan, and January 12, 1859, with Russia, no such reservations are found. With respect to the convention signed at Brussels March 5, 1902, for the abolition of bounties and the limitation of the surtax on sugar, the House of Commons, by a resolution adopted November 24, 1902, approved the policy embodied in the convention, and declared that in the event of its receiving the ratification required to make it binding, the House was prepared to adopt the necessary measures to enable His Majesty to carry out its provisions.[2] The House thus pledged itself to execute the convention.

Blackstone wrote more than a century and a quarter ago, "Natural allegiance is therefore a debt of gratitude which cannot be forfeited, cancelled or altered by any chance of time, place or circumstances, nor by anything but the united concurrence of the legislature."[3] In the negotiations leading up to the naturalization treaty of May 13, 1870, with the United States, recognizing the right of expatriation, the British government maintained that legislation by Parliament should precede the signing of the treaty, or else its validity should be made depend-

[1] Art. I. *Ibid.*, vol. lxxxii, p. 11. See *53 & 54 Vict.*, c. 8, sec. 3.

[2] *Parliamentary Debates* (4th series), vol. cxv, pp. 271, 371.

[3] *Commentaries*, vol. i, p. 369.

ent upon such legislation. No act for this purpose having passed Parliament, when the protocol of October 9, 1868, embodying the substance of what was afterwards incorporated in the treaty, was signed by Mr. Johnson and Lord Stanley, it was expressly stipulated that, since it would not be practicable for Great Britain to carry into operation the principles laid down in the protocol until provision had been made by Parliament for a revision of the laws, the protocol should not take effect until such legislation had been accomplished.[1] The treaty as signed May 13, 1870, contains no such reservation, since an act of Parliament of May 12 recognized the principles of the treaty and enacted them into law.[2] A supplemental convention was signed February 23, 1871, and, to remove all doubts as to whether the act of 1870 provided for the full execution of it, the additional act of July 25, 1872, was passed.[3]

In matters usually subject to uniform international regulation, provision is often made by a general law for the execution of agreements concluded in conformity thereto. The extradition act of 1870, as supplemented by the acts of 1873 and 1895, provides (sec. 2) that "Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by order in council, direct that the said act shall apply in the case of such foreign state."[4] Under these acts Her Majesty, by orders in council of February 22, 1896, November 27, 1896, August 9, 1898, and October 20, 1898, made ef-

[1] *Brit. and For. State Papers*, vol. lix, pp. 29, 30, 32.

[2] *Ibid.*, vol. lx, p. 267.

[3] *Ibid.*, vol. lxii, p. 1208. See act of 1895, *ibid.*, vol. lxxxvii, p. 944.

[4] *Ibid.*, vol. lx, p. 145; vol. lxiii, p. 391; vol. lxxxvii, p. 957.

fective respectively the treaties of extradition of February 13, 1896, with France, August 27, 1896, with Belgium, January 26, 1897, with Chile, and February 22, 1892, with Bolivia.[1] Prior to the passage of the act of 1870, special statutes were required to make such treaties effective. Article X of the treaty of August 9, 1842, with the United States, which related to extradition, was not effective as a law of the land until the passage, August 22, 1843, of an act for that purpose.[2] Another act of the same date, for the execution of the treaty of extradition with France of February 13, 1843, failed to give full effect to the treaty. During the period between 1843 and 1852, out of fourteen fugitives claimed by France only one was secured under the treaty.[3] In each of the extradition treaties signed May 28, 1852, with France, April 15, 1862, with Denmark, and March 5, 1864, with Prussia, an article was inserted[4] in which the operation of the treaty was expressly made dependent upon the passage by Parliament of the necessary laws for its execution. In the first of these treaties the Crown engaged only to recommend to Parliament the passage of an appropriate act; and, Parliament having refused to provide the requisite legislation, the treaty remained inoperative, although the exchange of ratifications had taken place.[5] Section 238 of the general merchant shipping act of August 25, 1894, authorizes the Crown to apply by order in council the provisions of the act for surrendering

[1] *Brit. and For. State Papers*, vol. lxxxviii, pp. 179, 180; vol. xc, pp. 231, 235.

[2] *6 & 7 Vict.* c. 76.

[3] *6 & 7 Vict.* c. 75. Clarke, *Extradition* (3rd ed.), p. 131.

[4] Art. XV, Art. IV and Art. III respectively. *Brit. and For. State Papers*, vol. xli, p. 20; vol. lii, p. 30; vol. liv, p. 20.

[5] Hansard's *Debates*, vol. cxxi, p. 1370; vol. cxxii, pp. 192, 561, 1278.

deserting seamen to any foreign country that guarantees similar facilities for the recovery of deserters from British merchant vessels. By order in council of February 3, 1898, these provisions were made applicable to Japan.[1]

Section 103 of the general patent and trade-marks act of 1883, as amended by the act of 1885, gives similar power to the Crown as to patent and trade-mark agreements. By orders in council of October 15, 1894, November 20, 1894, and October 7, 1899, privileges under these acts were extended to Greece, Denmark and Japan respectively.[2] In the preamble of the international copyright act of 1886 is the following recital with respect to the draft of a convention agreed to at the Berne conference of 1885, "And whereas, without the authority of Parliament, such convention cannot be carried into effect in Her Majesty's dominions and consequently Her Majesty cannot become a party thereto, and it is expedient to enable Her Majesty to accede to the convention: Be it therefore enacted * * *"[3] If the stipulations of a copyright convention do not transcend the provisions of the general international copyright acts they may be made effective by an order in council. An order of April 30, 1894, gave effect to the special convention with Austria-Hungary of April 24, 1893.[4] The act of August 2, 1883, to carry into effect the North Sea fisheries convention, signed May 6, 1882, and to amend the laws relating to

[1] *Brit. and For. State Papers*, vol. lxxxvi, p. 724; vol. xc, p. 201. See similar provision in foreign deserters act of 1852, *ibid.*, vol. xli, p. 680.

[2] *46 & 47 Vict.* c. 57. *Brit. and For. State Papers*, vol. lxxxvi, pp. 118, 122; vol. xci, p. 1130.

[3] *49 & 50 Vict.* c. 33.

[4] *7 & 8 Vict.* c. 12; *15 & 16 Vict.* c. 12; *38 & 39 Vict.* c. 12. *Brit. and For. State Papers*, vol. lxxxvi, p. 97.

British sea fisheries, authorized Her Majesty to apply the act in whole or in part to conventions that might be made with foreign powers respecting sea fisheries.[1] The postal-union convention signed at Berne, October 9, 1874, was carried into effect by the act of June 14, 1875. By section 2 of this act the Treasury is authorized to make such regulations as may seem necessary for carrying into effect arrangements made by Her Majesty with any foreign country with respect to the conveyance by post of any postal packet between the United Kingdom and places outside; and by section 14 of the act of August 18, 1882, to modify or except, on the recommendation of the Commissioners of Customs and the Postmaster-General, for the purpose of carrying into effect any treaty or agreement with a foreign state, the application of any of the customs enactments to foreign parcels.[2]

By a treaty with Belgium of February 17, 1876, packet-boats employed in the conveyance of postal matter between certain ports were to be considered as having the immunities and privileges of ships of war.[3] A collision occurred between a ship owned by British subjects and a packet-boat, the "Parlement Belge," running in accordance with the treaty between Dover and Ostend, a ship moreover the property of the King of the Belgians and carrying the royal pennon. Acts of Parliament[4] conferred a statutory right on owners of vessels damaged at sea by collision to obtain in the Admiralty Court redress by proceedings *in rem*. Such proceedings having been instituted against the "Parlement Belge," the case came before Sir Robert

[1] *46 & 47 Vict.* c. 22, sec. 23.

[2] *38 & 39 Vict.* c. 22; *45 & 46 Vict.* c. 74.

[3] Art. VI.

[4] *3 & 4 Vict.* c. 65, sec. 6; *24 Vict.* c. 10, sec. 7.

Phillimore in the Admiralty division in March, 1879. It was admitted that the convention had never been confirmed by statute. On the part of the Crown it was contended, "both that it was competent to Her Majesty to make this convention, and also to put its provisions into operation without the confirmation of them by Parliament." The plaintiffs admitted the former proposition but denied the latter. The only question before the court, was, as Sir Robert Phillimore held, did the treaty of itself exempt the vessel from the proceedings? *i. e.*, could a right of a British subject recognized by Parliament be ceded or extinguished by the Crown without the sanction of the legislature? Upon this he decided in the negative, observing: "If the Crown had power without the authority of Parliament by this treaty to order that the "Parlement Belge" should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for against her as a wrongdoer on account of the collision, cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished. This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent and in principle contrary to the laws of the constitution."[1] On appeal the decision was reversed, but on the ground that the "Parlement Belge" as a public ship, belonging to the King of the Belgians, was according to international law (which was thus recognized as a part of the law of the land) exempt from proceedings *in rem* independently of the immunities that might arise under the treaty.[2] The principle on which the decision of the lower court was based has been main-

[1] *The Parlement Belge*, 4 Law Reports, Probate Division, 149, 154.

[2] 5 Law Reports, Probate Division, 197.

tained in debates and in diplomatic correspondence. Mr. Gladstone, in opposing the course of Conservatives in 1890, in requiring the assent of Parliament to the cession of the island of Heligoland, observed, "I believe it to be also a principle—and I speak subject to correction—that where personal rights and liberties are involved they cannot be, at any rate, directly affected by the prerogative of the Crown, but the assent of Parliament, the popular, elected body to a representative chamber is necessary to constitute a valid treaty in regard to them."[1] The same principle was involved in the declaration made by the Marquis of Salisbury in the Bering Sea correspondence with the United States in 1890, that the British government could not, without legislative sanction, exclude for an hour British or Canadian vessels from any portion of the high seas.[2]

On the principle that the Crown cannot annul a law by treaty or destroy legal rights of British subjects, the question has often been raised by British statesmen, whether territory for which special laws have been passed by Parliament, or territory acquired by settlement, to which according to English jurisprudence a British subject is considered to have carried in some degree the rights and privileges of British subjects and the laws of his country, can be ceded by the Crown without the sanction of Parliament. Territory acquired by conquest falls immediately under the legislative power of the Crown in Council, while that acquired by settlement does not so fall unless by virtue of an act of Parliament.[3]

[1] Hansard's *Debates*, vol. cccxlvii, p. 761.

[2] *For. Rel. of the U. S. 1890*, p. 433.

[3] Anson, *Law and Custom of the Constitution*, vol. ii, p. 258. The British settlement act of 1887 places under the legislative power of the Crown in Council all possessions acquired by settlement, in contradis-

The right of the Crown to establish by treaty a boundary, whatever may have been the manner in which the territory affected was acquired or has been governed, seems to be well established and supported by precedents. While a treaty simply to determine a boundary line operates as an acknowledgment of title rather than as a treaty of cession,[1] precedents may be found in which territory has by express stipulation been exchanged.[2]

The question of the power of the Crown to cede territory was considered in concluding the first peace with the United States. Special acts had been passed, applying to the American colonies. Among these were the act of *16 George III*, c. 5, which prohibited trade, and the act of *17 George III*, c. 7, which authorized hostilities. In arranging for the treaty, it seemed to some to be necessary, in order to annul these and other laws applying to the colonies, that Parliament should give its assent to the conclusion of a treaty. Accordingly, an act was passed authorizing the king to conclude a treaty and annul and make void any inconsistent act.[3] Uncertainty as to the necessity of this measure was expressed in the debates. Earl Shelburne on December 13, 1782, in reply to a question respecting the provisional treaty said: "That agreement had been made in consequence of an

tinction to those acquired by conquest and cession, not for the time being within the jurisdiction of the legislature of any British possession. *50 & 51 Vict.* c. 54, sec. 6.

[1] Hall, *International Law* (4th ed.), p. 102.

[2] A notable case is the exchange of territory on the Gold Coast expressly stipulated for in Art. I of the treaty with the Netherlands of March 5, 1867. The act of Parliament of April 11, 1843, placing British settlements on or adjacent to the coast of Africa, under the legislative power of the Crown in Council was, it would seem, applicable to this territory. *6 & 7 Vict.* c. 13.

[3] *22 George III*, c. 46.

act of the last session, empowering His Majesty to conclude the difference between this country and America, so anxious had Parliament been that there should be no obscurity in the matter."[1] The peace as signed was in the nature of a treaty of recognition and partition, and may in this respect be distinguished from a treaty of cession.

Various opinions as to the power of the Crown have been expressed in Parliament. On May 9, 1854, Sir Alexander Cockburn, Attorney-General, stated his views relative to the relinquishment by order in council of British sovereignty over the Orange River territory. According to his opinion, when the Cape of Good Hope was acquired, the Boers, in order to avoid the jurisdiction of the English, left the country and established themselves in the territory of the Orange River. They were pursued by the British troops, overcome and compelled to acknowledge British sovereignty over this territory. It was then, said Sir Alexander Cockburn, acquired by conquest, and "the Crown acting under the advice of the Privy Council had a perfect right" to give it up. In the course of his argument he observed that colonies might be divided into two classes, "such as were acquired by occupancy, and such as were acquired by conquest and by cession." While there was no question as to the right of the Crown to cede those acquired by conquest, he was aware that there existed considerable difference of opinion as to whether those acquired by occupancy could be alienated otherwise than by an act of the legislature.[2] On February 10, 1863, Lord Palmerston, in the debate on the relinquishment of the pro-

[1] *Parl. Hist.*, vol. xxiii, p. 307.

[2] Hansard's *Debates*, vol. cxxxiii, pp. 81, 82.

tectorate influence over the Ionian Islands, after pointing out the radical distinction between such a relinquishment and an actual cession, added: "But with regard to cases of territory acquired by conquest during war, and not ceded by treaty, and which are not therefore British freehold, and all possessions that have been ceded by treaty and held as possessions of the British Crown, there is no question that the Crown by its prerogative may make a treaty alienating such possessions without the consent of the House of Commons."[1] In direct answer to a question on the prerogative of the Crown in this respect, Sir Roundell Palmer, Solicitor-General, on March 24, 1863, said: "When British subjects have settled in newly discovered territories, not countries acquired by conquest or cession, they carry with them the laws of this country. In that case cession could not take place without the consent of Parliament. In the case of conquered or ceded countries, if Parliament had legislated concerning these countries, then I apprehend the concurrence of Parliament might be necessary."[2] It being suspected in Parliament that negotiations were taking place for the cession to France of the Gambia Settlement, a region explored and occupied in the early part of the seventeenth century by English, French and Portuguese traders, and expressly assigned to Great Britain by Article X of the treaty with France of September 3, 1783,[3] Mr. Gladstone was asked on June 10, 1870, whether it was possible that the Settlement and the great arterial communication of Africa could be conveyed to France without the consent of Parliament. He replied, that his impression was that such an agreement could not be carried out

[1] Hansard's *Debates*, vol. clxix, p. 230. [2] *Ibid.*, vol. clxix, p. 1808.
[3] Chalmer's *Treaties*, vol. i, p. 500.

without the consent of Parliament; and added that there never had been the slightest intention of taking any proceedings of the kind without such consent.[1] To the observation made by the Duke of Manchester in the House of Lords, that the transaction appeared "to involve the undue exercise of the prerogative of the Crown," Earl Granville replied that at the beginning of the negotiations it had been distinctly stated that "nothing could be completed without the consent of Parliament."[2]

The Privy Council found occasion to express an opinion on this subject in a decision rendered through Lord Selborne (Sir Roundell Palmer) March 28, 1876. The case came before the council on an appeal from the High Court of Bombay. This court had based its decision on the principle "that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British courts in India in time of peace to a foreign power." The council supported the decision of the lower court, but not on the same ground. It found in point of fact that there had been no cession of territory in the case, nothing more than an attempted rearrangement of jurisdiction within British territory. As to the ground on which the High Court of Bombay rested its decision, the council said, "But having arrived at the conclusion that the present appeal ought to fail, without reference to that question, they think it sufficient to state that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of Bombay as to be unable to advise Her Majesty to rest her

[1] Hansard's *Debates*, vol. cci, p. 1843.

[2] *Ibid.*, vol. cciii, pp. 339, 341.

decision on that ground."[1] It is worthy of note that the eminent jurist Mr. Forsyth, who has contended for a limitation on the Crown in this respect, and who appeared for the respondents in this case, was unable to cite to the satisfaction of the court any instance in which the assent of Parliament had been given to a cession of territory.[2]

By the treaty signed on July 1, 1890, however, it is expressly stipulated that, "Subject to the assent of the British Parliament the sovereignty over the island of Heligoland together with its dependencies is ceded by Her Britannic Majesty to His Majesty the Emperor of Germany."[3] The island had been seized from Denmark in 1807, and the conquest was formally recognized by that country in the treaty signed at Kiel, January 14, 1814.[4] It remained under the legislative powers of the Crown in Council and was peopled principally by the native Germanic stock.[5] The course of the Conservatives in inserting in the treaty a clause requiring the assent of Parliament to the cession was opposed by the Liberals, especially by Mr. Gladstone and Sir W. Vernon Harcourt. The former declared with some emphasis that in the whole course of its existence the House of Commons had never before been asked to vote a cession of territory, whatever its nature, and that such a procedure had at the most only dicta of legal authorities for its support, while the uniform practice of the government

[1] Gordhan *vs.* Kanji, 1 Law Reports House of Lords and Privy Council Appeal, 332, 373, 382.

[2] *Ibid.*, p. 367.

[3] Art. XII. *Brit. and For. State Papers*, vol. lxxxii, p. 46.

[4] Art. III. Hertslet's *Map of Europe by Treaty*, vol. i, p. 27.

[5] Attorney-General Sir. R. Webster, Hansard's *Debates*, vol. cccxlvii, p. 830.

stood opposed.[1] The Conservatives defended their action on the ground of expediency and desirability rather than of necessity. Mr. Goshen, Chancellor of the Exchequer, remarked in debate, "We do not for a moment base our argument on the assumption that the assent of Parliament was indispensable to the cession."[2] Mr. Balfour considered the constitutional law and practice in question in a nebulous and very uncertain condition. It seemed to him an absurd doctrine of constitutional law that any treaty which involved even a sixpence of expenditure should require the assent of Parliament, but that one which might involve the cession of places of vital interest to the safety of the British Empire could be consummated by a ministry, which might be called to account but could not be prevented from carrying out its policy. In reply to Sir W. Vernon Harcourt's objection, that the present procedure would establish a binding precedent, Mr. Balfour said: "I do not object to its being a binding precedent if you do not exceed the precedent. The precedent is this—that in a time of profound peace, when no great public emergency threatens the state, when no other and ulterior considerations were involved, when no difficulties of negotiation would be produced, then, and then only, a cession of British territory and the transfer of British subjects to a foreign dominion, should not be undertaken until the assent of both Houses of Parliament had been declared. That is the precedent we have set. * * * It is a precedent which we think ought to be followed."[3] Parliament gave its assent to the cession by the act of August 4, 1890.[4] From subsequent practice it may be concluded that the precedent in the case of

[1] Hansard's *Debates*, vol. cccxlvii, pp. 760, 764, 773. [2] *Ibid.*, p. 771.
[3] *Ibid.*, pp. 787, 788. [4] *53 & 54 Vict.* c. 32.

Heligoland does not affect the power of the Crown to adjust by mutual exchange of territory boundaries of colonial possessions, or to relinquish such rights of sovereignty as were yielded to Germany and the United States in the Samoan treaties of November 14 and December 2, 1899. Even by those who seek to place a limitation on the prerogative of the Crown, it is usually conceded that in concluding peace, and especially in the event of a calamitous war, an unusual power may be exercised.

Efforts have been made to provide for the compulsory submission of treaties to Parliament before their ratification. Three resolutions to this effect were introduced in Parliament in 1873—February 14, declaring that all treaties with foreign powers ought to be laid before both Houses before being ratified; March 3, embodying an address to the Crown praying that all treaties, by which disputed questions between Great Britain and a foreign power were to be referred to arbitration, might be laid before both Houses of Parliament six weeks before they were definitely ratified; and on March 4, declaring that all treaties ought to be made subject to the approval of Parliament, as in the case of the commercial treaty of 1860 with France.[1] On the other hand, the suggestion that treaties should be approved by Parliament in advance of their definitive conclusion has been objected to on the ground that the efficacy of parliamentary responsibility would thereby be impaired. Lord Palmerston being asked, April 11, 1864, in reference to the coming conference on the affairs of Denmark, whether the engagements that might be formed would be submitted for the consent of Parliament before the ratifica-

[1] Hansard's *Debates*, vol. ccxiv, pp. 448, 1166, 1178, 1309, 1319.

tion by the Crown was advised, replied: "It is not the practice, nor is it in accordance with the principles of the Constitution, that the Crown should ask the advice of its Parliament with respect to engagements which it may be advised are proper to be contracted."[1]

France

I. PRIOR TO 1875

The registering, or the repudiating, of a few exceptional treaties by the parlement of Paris or by the states-general, at the will of the king, or, in his absence, of the regent, does not warrant any qualification of the statement that prior to the Revolution the treaty-making power in France resided exclusively in the king. The two treaties most frequently adduced in contentions to the contrary—the terms of peace agreed to by King John after the battle of Poitiers in 1356, and the treaty of Madrid, signed by Francis I, January 14, 1526, after the defeat of Pavia—were signed by captive kings, and in the latter case the signature was given under a secret protest. The first treaty was, regardless of the captive king's wish, declared not binding by the states-general assembled for that purpose by the dauphin, and the war continued until the peace of Bretigny in 1360; the second, although valuable hostages had been pledged, was repudiated in accordance with the request of the released king by the parlement of Paris.[2] It is also true that the important treaty of Troyes signed May 21, 1420, by

[1] Hansard's *Debates*, vol. clxxiv, p. 788. See also vol. ccvi, p. 1106; vol. cciii, pp. 1776, 1790.

[2] A. Saint Girons, *Manuel de Droit Constitutionnel*, p. 465. Martin, *Histoire de France*, vol. viii, p. 104. Kitchen, *History of France* (3rd ed.), vol. i, p. 460; vol. ii, pp. 209, 210.

which France and England were to be joined ultimately under one king, was, after important stipulations had been executed, submitted to the states-general for confirmation. To Henry V, of England, this confirmation seemed to furnish additional security for the full execution of the treaty.[1] As early as 1321 the states-general protested against the selling of the royal domain. The advice of the estates assembled at Blois in 1576 having been asked by Henry III upon a proposal to sell territory in order to obtain means to carry on a war, the nobles and clergy consented, but the *tiers état* objected, and the sale does not appear to have been made.[2] An internal disposition of the royal domain was, however, a different thing from a cession by international treaty, and the admission of a restraint in the former case did not necessarily imply a check on the royal prerogative in the latter. The parlement of Paris was called upon at various times to register treaties—in 1480, to register the treaty of October 9, 1478, with Spain; in 1483, the treaty with Maximilian signed at Arras, December 25, 1482.[3] It is recorded that in the latter case the court deliberated upon the different clauses. Several treaties were registered during the reigns of Charles VIII and Louis XII.[4] It was expressly stipulated in the treaty of the Pyrenees of November 7, 1659, that for greater security, it should be published, ratified and registered in the court of the parlement of Paris, and in all other parlements of France, as also in the

[1] Stubbs, *Constitutional History of England*, vol. iii, p. 89. Picot, *Histoire des États Généraux*, vol. i, pp. 284-6.

[2] Picot, vol. i, pp. 29, 339-41; Martin, vol. ix, p. 460; Kitchen, vol. ii, pp. 373-4.

[3] Aubert, *Histoire du Parlement de Paris*, vol. i, p. 352.

[4] *Ibid.*, p. 353.

chamber of accounts.[1] Similar articles are found in the important treaties signed at Aix la Chapelle, May 2, 1668, with Spain;[2] at Nimeguen, September 17, 1678, with Spain;[3] and at Ryswick, September 20, 1697, with the United Provinces and with Spain.[4] The action of the compliant parlement in this particular, however, could hardly insure it any recognition as a distinct organ in treaty-making.

The principal discussions as to treaty-making, in the Constituent Assembly that framed the constitution of 1791, occurred, May 16–23, 1790, on the question whether the nation ought to delegate to the king the exercise of the power of peace and of war.[5] The lamentable treaties of Louis XV, by which France had been stripped of her colonial possessions, were quite naturally associated by some with the unrestrained power of the king in treaty-making.[6] Numerous measures differing much in their nature were introduced. On May 16 a project was submitted by le curé Jallet providing that the king should not enter into negotiations for peace or alliances without the consent of the assembly.[7] A project submitted the following day by M. de Villeneuve assigned to the king the power of proposing conditions of peace and projects of treaties, but always subject to the modification and approval of the legislative body.[8] It was contended in the course of debate that the king should be given the power to conclude treaties of peace—by le comte Sérent, without restriction;[9] by le comte

[1] Art. CXXIV. [2] Art. IX. [3] Art. XXXI.

[4] Articles XXII and XLV of the treaties with the United Provinces, and Art. XXXVII of treaty with Spain. *Collection of Treatys*, vol. i. pp. 97, 160, 232, 316, 331, 345.

[5] *Le Moniteur*, p. 554 et seq. [6] *Ibid.*, p. 557, col. 2.

[7] *Ibid.*, p. 555, col. 2. [8] *Ibid.*, p. 558, col. 1. [9] *Ibid.*, p. 554, col. 2.

Galissonnière, on the authority of a responsible minister;[1] by various others, with the qualification that treaties providing for the furnishing of subsidies or for the cession of the territory or property of the nation should require legislative sanction. With the treaty clause as with many other sections of the constitution of 1791, it was Mirabeau's project that was finally adopted as the basis of the constitutional provision. According to his project, as introduced May 20, and later adopted by the Assembly, it appertained to the executive to arrange and sign with foreign powers all conventions which he should judge necessary for the welfare of the state, but treaties of peace, of alliance, and of commerce, were not to be executed until ratified by the legislative body.[2] On May 24, subsequently to the adoption of this project, the wording was, at the suggestion of Mirabeau and with the unanimous consent of the Assembly, so changed as to require legislative approval for all treaties.[3] By the constitution of 1793 treaties were to be negotiated by the Executive Council, composed of twenty-four members chosen by the national legislature from the candidates nominated by department electoral assemblies, and were to be ratified by the national legislature.[4] The constitution of 1795 committed to the Directory the negotiating and signing of treaties, but all treaties before they could become valid were to be examined and ratified by the legislative body. Secret articles might be arranged, and might receive a provisional execution independent of the legislature, but such articles must

[1] *Le Moniteur*, p. 570, col. 1. [2] *Ibid.*, p. 572, col. 3.

[3] *Ibid.*, p. 589, col. 2. Title III, ch. 4, sec. 3, Art. III, and title III, ch. 3, sec. 1, Arts. II and III of the constitution. See for text, Dalloz's *Répertoire de Jurisprudence*, vol. xviii, pp. 291, 293.

[4] Arts. LXX and LV. Text, *ibid.*, p. 299.

not be destructive of the open stipulations, or provide for an alienation of territory.[1] In the constitution of 1799, it was provided that the government, *i. e.*, the three Consuls, should conduct the negotiations, make the preliminary stipulations, sign, have signed, and conclude all treaties of peace, alliance, neutrality, and commerce, and other treaties. Treaties of peace, alliance and commerce should be proposed, discussed, decreed, and promulgated as laws. The government could, however, demand secrecy.[2] The natural inference from the specific enumeration in the two articles, the one immediately following the other, is that treaties other than those of peace, alliance and commerce, were to be consummated on executive authority. The constitution in the form of a *sénatus-consulte* of August 4, 1802, gave to the First Consul the power to ratify treaties of peace and alliance, after having taken the advice of the Privy Council. Before promulgation he was to inform the Senate.[3] No reference was made to treaties other than those of peace and alliance, but the designation doubtless seemed sufficiently comprehensive at the time. From the organic law of May 18, 1804, accompanying the declaration of the Empire,[4] until the constitution of 1848 the power to make treaties was vested solely in the Executive.[5] The charters of 1814 and 1830 both provided, however, for a responsible ministry.

During this period the question mooted in the United States, of the function of the legislature in the execution of treaties that stipulate for changes in the revenue laws

[1] Arts. CCCXXX, CCCXXXI, CCCXXXIII. *Ibid.*, p. 310.

[2] Arts. XLIX and L. *Ibid.*, p. 313.

[3] Art. LVIII. *Ibid.*, p. 318.

[4] *Ibid.*, p. 318.

[5] Art. XIV of the constitutional charter of 1814; Art. XIII constitutional charter of 1830. *Ibid.*, pp. 326, 333.

or for appropriations, was the subject of discussion. The charters specifically provided that no impost should be levied or collected unless consented to by the two chambers and sanctioned by the king,[1] and that all propositions for imposts were to be first considered in the Chamber of Deputies.[2] On February 8, 1826, an ordinance was issued for the full execution of a convention with Great Britain for the abolition of discriminating duties, signed January 26, 1826.[3] In April following, while the general tariff law was undergoing revision in the Chamber of Deputies, an amendment was introduced giving to the ordinance of February 8 the sanction of a law.[4] All seemed to be agreed that the treaty was advantageous to France; indeed, M. Casimir Périer, who proposed the amendment, expressly stated that he entirely approved its stipulations. The discussion was confined to the constitutional question, whether the king could by means of a treaty modify the revenue laws. The Deputies by a vote of 183 to 145 insisted upon a legislative execution.[5]

The convention with the United States of July 4, 1831, provided for the payment of 25,000,000 francs in six annual installments in settlement of claims against the French government. The first installment fell due February 2, 1833, but no provision had been made for its payment, nor had the government asked the chambers for an appropriation. In the April following a bill was introduced into the Chamber of Deputies authorizing the Minister of Finance to take measures for the execution of the treaty, but it was not pressed to a vote until a

[1] Arts. XLVIII and XL. [2] Arts. XVII and XV.
[3] Hertslet's *Commercial Treaties*, vol. iii, pp. 123, 134.
[4] *Le Moniteur*, p. 548, col. 3. [5] *Ibid.*, p. 555, col. 3.

year later, and was then rejected by a vote of 176 to 168.[1] In defense of the action of the Chamber of Deputies, the argument was diplomatically urged by the French government that the financial responsibility of the state could be pledged only by a vote of the legislature; but in the discussion before the Deputies, the administration, the Duc de Broglie being Minister of Foreign Affairs, gave fair support to the bill, and in the course of the debate the contention was made that the honor of the nation was committed.[2] Moreover, the action of the chambers in ultimately providing for the fulfillment of the terms of the treaty may be considered a further recognition of its obligatory force. In estimating the attitude of the American government, the fact is not to be overlooked that the action of the Deputies appeared to be a repudiation of a debt not contracted by the treaty, but of long standing and of serious origin, and of which the treaty was but an acknowledgment.[3] It was this circumstance, as well as the refusal to execute the treaty, that prompted President Jackson to recommend reprisals, and the House of Representatives unanimously to resolve that the execution of the convention should be insisted upon.[4]

Under the constitution of 1848 the President of the Republic negotiated and ratified treaties; but no treaty was definitive until approved by the National Assembly.[5] While the project of a law was pending, to authorize the

[1] *Le Moniteur*, p. 770, col. 1. Moore, *International Arbitrations*, vol. v, p. 4463.

[2] *House Ex. Doc.* 40, p. 80, 23rd *Cong.* 2nd *sess.* See *Le Moniteur*, p. 764, col. 2.

[3] Wharton's *International Law Digest*, vol. ii, p. 20.

[4] Resolution adopted Mar. 2, 1835. *Cong. Debates*, vol. xi, pt. 2, pp. 1633, 4.

[5] Art. LIII. *Brit. and For. State Papers*, vol. xxxvi, p. 1078.

ratification of a treaty with Sardinia, signed November 5, 1850, objections were raised to particular articles of the treaty, and a proposal was made to amend them. This was opposed by the president of the Assembly who maintained that the function of that body was to accept or reject the treaty as signed.[1] He was unable to see how the Assembly could modify a treaty with a party who was not present and with whom it could not negotiate. A member[2] observed that the amendment was made, not to the treaty but to the law approving it, for the purpose of indicating to the Executive the basis on which the treaty must be concluded in order to meet the approval of the Assembly. To this the president replied that the wishes of the Assembly could be indicated by the debates, and that action on the question of approval might be postponed until the Executive had negotiated for the desired changes. He raised the objection that the vote of the Assembly in advance would be in effect an ultimatum. The motion to authorize the ratification of the treaty with modifications was rejected by the Assembly,[3] and on March 20, 1851, resolutions were adopted to regulate its procedure in acting upon treaties. They provided among other things that the Assembly might not present amendments to the text; that its function was confined to the adoption or rejection of, or to the suspension of action on, the project of law authorizing the ratification; and that, in case of such suspension, it might call the attention of the Government to the objectionable clauses.[4] This method of accepting or rejecting *in toto* is followed at the present day.

[1] *Le Moniteur*, p. 3769, col. 2.
[2] *M. de Leyval.*
[3] *Le Moniteur*, p. 3771, col. 1.
[4] *Le Moniteur*, p. 820, col. 3.

Article VI of the constitution, proclaimed by Louis Napoleon January 14, 1852, gave to the President of the Republic power to conclude treaties.[1] Article III of the *sénatus-consulte* of December 23, 1852, modifying the constitution, specifically provided that treaties of commerce made in virtue of Article VI of the constitution should have the force of laws in the modification of tariff rates.[2] Although the treaty-making power was thus vested absolutely in the Executive, the treaty of Turin of March 24, 1860, by which Savoy and the arrondissement of Nice were to be united as an integral part of France, was confirmed by a *sénatus-consulte*—an act of the sovereign or amending power under the constitution —of June 12, 1860, subsequently to the exchange of the ratifications.[3] The *sénatus-consulte* of September 8, 1869, amending the constitution of 1852, and the *sénatus-consulte* of December 23, 1852, provided that thenceforth treaties stipulating for a modification of tariffs or postal rates should be binding only by virtue of a law.[4]

With the defeat at Sedan a provisional Government of National Defense was formed September 4, 1870, by whose authority military conventions were concluded and preliminary negotiations of peace conducted. Bismarck, however, requested that the treaty of peace should have the sanction of a national assembly, and in the preliminary articles signed February 26, 1871, there was inserted an express provision for ratification by the National Assembly.[5] From the meeting of the National Assembly in

[1] *Brit. and For. State Papers*, vol. xli, p. 1086.

[2] *Ibid.*, vol. xli, p. 1338.

[3] De Clercq's *Recueit des Traités de la France*, vol. viii, pp. 32, 48.

[4] Art. X. Duvergier's *Lois, Décrets, etc.*, vol. lxix, p. 285.

[5] Art. X. De Clercq's *Recueil des Traités de la France*, vol. x, p. 435.

February, 1871, until the adoption of the Constitutional Laws in 1875, treaties were negotiated by the Executive, but ratified only on the authority of a law of the National Assembly. As the law authorized the ratification, it preceded that act. In the case of two treaties, concluded on October 12, 1871, with Germany, relating, respectively, to the evacuation of certain departments by that power, and to commercial relations with Alsace-Lorraine, it preceded the negotiations.[1]

On March 13, 1873, the National Assembly voted to establish a second chamber and to determine upon the distribution of public powers. Accordingly M. Dufaure, for the Thiers Government, on May 19 laid before the Assembly a plan, in which it was provided that the President should negotiate and ratify treaties, but that no treaty should be definitive until approved by the two chambers.[2] M. Thiers was compelled to resign soon afterwards, and the project was not adopted. During the monarchical reaction, a project was, on May 15, 1874, presented by the Duc de Broglie. To the upper house, called the Grand Council, nearly one-half of whose members were to be appointed by the President for life, while most of the remainder were to be elected by the departments to serve for a period of nine years, was given the ratification of all treaties negotiated by the President.[3] An amendment made by the Assembly, which provided that the upper house should be entirely elective, rendered the plan so unacceptable to the Right that it was rejected. On May 18, 1875, M. Dufaure introduced a bill on the distribution of the public powers, Article VII of

[1] De Clercq's *Recueil des Traités de la France*, vol. x, pp. 495, 496, 498.

[2] Art. XIV. *Journal Officiel*, p. 3209, col. 2.

[3] Art. XIX. *Ibid.*, p. 3271, col. 3.

which, with the addition of clauses requiring the approval of the chambers for treaties of peace and those affecting the person and property of French citizens in foreign countries, was adopted as Article VIII of the Constitutional Law of July 16, 1875, which defines the treaty-making power in France at the present time.[1]

II. THE CONSTITUTIONAL LAW OF JULY 16, 1875

Article VIII of the Constitutional Law reads, "The President of the republic negotiates and ratifies treaties. He communicates them to the chambers as soon as the interest and safety of the state permit. Treaties of peace, and of commerce, treaties which involve the finances of the state, those relating to the persons and property of French citizens in foreign countries, shall become definitive only after having been voted by the two chambers. No cession, no exchange, no annexation of territory shall take place except by virtue of a law."[2] The French law thus attempts to classify under five general heads the treaties which require the approval of the legislature; but owing to the complex nature of the subject-matter of treaties, it is necessary, in order to determine specifically what treaties are thus included, to examine into the practice of the government. The legislative approval, in case it is required, is given in the form of a law authorizing the President to ratify the treaty and to cause it to be executed. It accordingly precedes the exchange of ratifications and regularly follows the signing.

In the negotiations to terminate the war with China,

[1] *Journal Officiel*, p. 3520, col. 1.

[2] See English translation by C. F. A. Currier, *Annals, American Academy of Political and Social Science*, vol. iii, supplement p. 166. See French text, *Brit. and For. State Papers*, vol. lxvii, p. 499.

preliminary articles of peace were signed at Tien Tsin, May 11, 1884, the principal articles of which were on May 20 communicated with explanations to the chambers for their consideration.[1] The definitive treaty of peace and commerce, signed June 9, 1885, was also submitted for legislative approval, which was given in the form of a law authorizing the President to ratify and execute. A similar law was passed by the Deputies February 27 and by the Senate March 6, 1886, approving the treaty of peace concluded with Madagascar December 17, 1885.[2]

Under the term *commerce* are included not only treaties that directly affect the existing tariff, and the revenue receipts, but also those for the general regulation of trade and intercourse. For instance, the ratification and execution of the general treaty of amity and commerce with Japan, signed August 4, 1896, were authorized by the special law of January 13, 1898, followed by the exchange of ratifications March 19, and the decree of promulgation July 30.[3] In the case of existing commercial treaties about to terminate, the approval of the chambers to their prolongation may be given in the form of a general law authorizing the President to secure an extension of the time for a period specified in the law; and agreements concluded conformably thereto are not submitted to the chambers for approval. On the authority of the law of August 4, 1879, agreements of this nature were reached with Great Britain, October 10; Belgium, October 18; Austria-Hungary, November 20; Sweden and Norway, November 25; Portugal, Novem-

[1] De Clercq's *Recueil des Traités de la France*, vol. xiv, pp. 298, 300.

[2] *Ibid.*, vol. xv, p. 922. Treaties often fall within more than one class. Thus the treaty with China could also be classed under commercial treaties.

[3] *Ibid.*, vol. xx, p. 550. *Bulletin de Lois*, vol. lvii, p. 1197, no. 1987.

ber 25; Italy, November 26; and Switzerland, November 29, 1879.[1] By the law of December 29, 1891, the Government was authorized not only to extend provisionally the whole or parts of treaties of commerce about to terminate, but to apply in whole or in part the minimum tariff rates to products of countries maintaining a conventional tariff, provided that such countries should consent to apply to French products the treatment of the most-favored-nation.[2] By virtue of this law a limited reciprocity in commerce was established by exchange of notes with Belgium, the Netherlands, Switzerland, Sweden and Norway, Greece, and Spain.[3] To secure the advantages of the American tariff, so far as it was subject to executive regulation by section 3 of the McKinley Act, a special law was passed January 27, 1893, authorizing the Government to apply certain minimum tariff rates to articles produced in the United States.[4] The agreement concluded with that country May 28, 1898, in which reciprocal tariff advantages were secured, was made effective by the President of France without submission to the chambers, by virtue of existing laws,[5] and by the President of the United States, without submission to the Senate, by virtue of section 3 of the act of July 24, 1897. Treaties securing commercial privileges with African tribes are frequently ratified and promulgated on executive authority. Commercial treaties entered into

[1] De Clercq's *Recueil des Traités*, vol. xii, pp. 476, 488, 490, 507, 509–511. See similar laws of July 20, 1881, and of Feb. 2, 1882, and the prorogation of treaties, *ibid.*, vol. xiii, pp. 59, 80–88, 235, 238 *et seq.*

[2] Art. II. *Ibid.*, vol. xix, p. 304. See also Art. IV of the law of April 5, 1898, *Bulletin des Lois*, no. 34558.

[3] De Clercq's *Recueil des Traités*, vol. xix, pp. 400, 403, 409, 457; vol. xx, p. 94.

[4] *Ibid.*, vol. xix, p. 547.

[5] *Ibid.*, vol. xxi, p. 379.

by the French government, acting in its suzerain capacity under the treaty of May 12, 1881, for Tunis, have not been submitted to the chambers for approval. The President of France, acting in his own name as well as in the name of his Highness the Bey, concluded a treaty of commerce relative to Tunis with the Italian government September 28, 1896. The treaty having been approved by the President, it was promulgated and put in force by a decree of the Bey, February 1, 1897, countersigned by the French minister resident in Tunis, who acts under the direction of the French foreign office.[1] In a similar manner treaty relations between Tunis and various other countries have been established.[2]

Telegraphic, postal-union, and monetary conventions, and those for the regulation of international railroad traffic, while they may indirectly involve the finances of the state, directly relate to trade and intercourse with foreign nations. The ratification of the general convention for the regulation of international railroad traffic, signed at Berne, October 14, 1890, was authorized by the law of December 29, 1891.[3] An agreement with Italy, signed January 20, 1879, relative to the establishment of international railroad stations; and three agreements signed with Belgium May 9, 1877, September 23, 1877 and February 20, 1878, relative to the construction and regulation of frontier railroads, were approved by laws.[4] The approval of the telegraphic conventions

[1] De Clercq's *Recueil des Traités*, vol. xx, pp. 596, 597.

[2] Switzerland, April 12, 1893, and Oct. 14, 1896; Austria-Hungary, July 20, 1896; Russia, Oct. 14, 1896; Germany, Nov. 18, 1896; Spain, Jan. 12, 1897; and Denmark, Jan. 21, 1897. *Ibid.*, vol. xx, p. 626 *et seq.*

[3] *Ibid.*, vol. xviii, p. 601.

[4] *Ibid.*, vol. xii, pp. 20, 41, 67, 376.

signed June 21, 1890, at Paris, and July 22, 1896, at Budapest, was given by the laws of June 19, 1891, and June 28, 1897, respectively.[1] The postal-union conventions, signed at Paris June 1, 1878, at Vienna July 4, 1891, and at Washington June 15, 1897, were approved by the laws of December 20, 1878, April 13, 1892, and April 8, 1898.[2] Special treaties to facilitate postal exchanges have occasionally been concluded and made effective without submission to the chambers, by virtue of existing laws.[3] Postal agreements of an administrative character are sometimes entered into by the Director-General of Posts.[4] The monetary convention between France, Belgium, Greece, Italy and Switzerland, signed at Paris, November 5, 1878, and the subsequent conventions of November 6, 1885, and November 15, 1893, modifying and revising it, have all been approved by special laws.[5]

Treaties entered into for the guarantee of loans potentially involve the *finances* and are accordingly submitted to the chambers for approval.[6] The convention with the United States signed at Washington, January 15, 1880, providing for the settlement by a commission of arbitration of claims of American citizens arising out of the

[1] De Clercq's *Recueil des Traités*, vol. xviii, p. 392: vol. xx, p. 433. See for special telegraphic and telephone conventions, and the dates of the laws approving them, *ibid.*, vol. xviii, p. 471 *et seq.*; vol. xix, pp. 268, 283, 513.

[2] *Ibid.*, vol. xii, p. 95; vol. xix, p. 114; vol. xxi, p. 82.

[3] See the conventions signed Jan. 17, 1894, with the Netherlands, and July 9, 1895, with Great Britain, *ibid.*, vol. xx, pp. 109, 110, 259, 263.

[4] The arrangements with Great Britain of Nov. 6 and 9, 1894, and Dec. 2 and 9, 1895, were thus concluded. *Ibid.*, vol. xx, pp. 181, 262.

[5] *Ibid.*, vol. xii, p. 356; vol. xv, p. 892; vol. xx, p. 71.

[6] The convention of Mar. 29, 1898, to facilitate a Greek loan was approved by law of Apr. 8, 1898. *Ibid.*, vol. xxi, p. 350.

French operations against Mexico, the Franco-Prussian war and the internal disturbances known as the "Insurrection of the Commune;" and on the other hand, of claims of citizens of France arising out of acts committed against their "persons and property" in the United States during the period between April 13, 1861 and August 20, 1866, required the approval of the chambers not only as involving the finances of the state but also as affecting the *persons and property of French citizens in a foreign country*.[1] Under this latter head would be classed very many of the claims conventions that have been concluded; such, for instance, as the convention signed at Santiago, November 2, 1882, for the settlement of the claims of French citizens for damages suffered during the war between Chili and Peru and Bolivia.[2] Treaties of extradition and those defining the duties and privileges of consuls are ratified only on legislative authority. As affecting the persons and property of French citizens in foreign countries may also be classed the following treaties of a special character which have been submitted for approval: the treaty with Switzerland, July 23, 1879, regulating the naturalization of children of former French citizens who have become by naturalization Swiss citizens;[3] the convention with Austria-Hungary, May 14, 1879, stipulating for judicial assistance to citizens of the one in the territory of the other;[4] the convention with Russia, July 27, 1896, exempting French citizens bringing action in Russia from any hindrance to which Russians are not subject;[5] a convention and additional protocol originally between France, Belgium,

[1] De Clercq's *Recueil des Traités*, vol. xii, p. 519. Law of June 16, 1880.

[2] *Ibid.*, vol. xiv, p. 61.

[3] *Ibid.*, vol. xii, p. 407.

[4] *Ibid.*, vol. xii, pp. 400, 527.

[5] *Ibid.*, vol. xx, p. 547.

Spain, Italy, Luxemburg, Netherlands, Portugal and Switzerland, signed at The Hague, November 14, 1896, designed to establish common rules concerning many matters of private international law and civil procedure;[1] the convention for the protection of industrial property signed at Paris, March 20, 1883,[2] and the international copyright convention signed at Berne, September 9, 1886, together with the additional act of May 4, 1896.[3] Agreements for the reciprocal protection of trade-marks are regularly submitted for legislative approval.[4] If for their execution no modification of existing legislation is required, agreements of this character have occasionally not been submitted.[5]

Of treaties affecting French *territorial* jurisdiction and accordingly submitted for legislative approval, the following may serve to indicate their varied character: the treaty of August 10, 1877, with Sweden, for the retrocession to France of the island of St. Bartholomew;[6] the agreement of June 29, 1880, with the king of the Society Islands, by which the complete sovereignty over these islands passed to France;[7] and the convention of May 12, 1881, by which Tunis placed itself under the protectorate influence of France.[8] Madagascar was

[1] De Clercq's *Recueil des Traités*, vol. xx, p. 642.

[2] *Ibid.*, vol. xiv, p. 203.

[3] *Ibid.*, vol. xvii, p. 253; vol. xx, p. 398.

[4] See for instances, *ibid.*, vol. xx, pp. 335, 430; vol. xxi, pp. 632, 774.

[5] See for instances, *ibid.*, vol. xii, pp. 541, 545. Art. VI of the trade-mark law of June 23, 1857, as modified by the law of Nov. 26, 1873, provides that foreigners may enjoy the benefits of the law, if in the country in which they are residing reciprocity for French marks has been established by diplomatic convention or law. *Sen. Doc.* 20, p. 364. 56th *Cong.* 2nd *Sess.*

[6] De Clercq's *Recueil des Traités*, vol. xii, pp. 35, 40.

[7] *Ibid.*, vol. xii, pp. 571, 624.

[8] *Ibid.*, vol. xiii, p. 25.

made a French colony by a law of August 6, 1896, accepting the act of the queen of that island making the cession. Likewise, a law of March 19, 1898, declared the Leeward Islands of the Tahiti group to be an integral part of the colonial domain of France.[1] Numerous treaties made with the less important African tribes, in which French sovereignty has been recognized, have not been submitted to the chambers for approval. A decree of August 1, 1895, issued upon the authority of the ministers of the colonies and of foreign affairs, ratified fourteen different treaties of this character concluded by army officers and other agents between December 21, 1894, and March 12, 1895.[2] Such agreements, however, can hardly be classed as treaties by which territory is acquired, since they cannot be exhibited alone as international titles, but must be accompanied by the establishment of authority sufficient to protect existing rights.[3] Agreements for the adjustment of boundaries, such as were concluded March 15, 1893, and April 4, 1900, with Belgium, in each of which there was an actual exchange of small portions of territory, require legislative approval.[4] So also boundary agreements relative to colonial possessions are usually ratified on the authority of a law. Of these, the agreements with Germany of December 24, 1885, March 15, 1894, and July 23, 1897;[5] with the Congo of August 14, 1894;[6] with

[1] De Clercq's *Recueil des Traités*, vol. xx, p. 585; vol. xxi, p. 349.

[2] *Ibid.*, vol. xx, p. 297. See similar decree of Mar. 1, 1895, *ibid.*, p. 217.

[3] See Art. XXXV of the treaty of Berlin signed Feb. 26, 1885. *Brit. and For. State Papers*, vol. lxxvi, p. 19.

[4] De Clercq's *Recueil des Traités*, vol. xx, pp. 16, 21; vol. xxi, p. 646.

[5] *Ibid.*, vol. xv, p. 927; vol. xx, p. 117; vol. xxi, p. 281.

[6] *Ibid.*, vol. xx, p. 165.

Spain of June 27, 1900;[1] and with Great Britain of June 14, 1898,[2] for the determination and settlement of boundaries between possessions in Africa, may be noted. Likewise, the convention of November 29, 1888, and of April 10, 1897, with the Netherlands and Brazil, respectively, by which the determination of the boundaries of French Guiana was referred to arbitration, were submitted for approval.[3] The agreement with Great Britain signed August 10, 1889, relative to boundaries between French and British possessions on the west coast of Africa, was ratified on executive authority, and may be noted as an exception.[4]

Treaties not included under one of the heads enumerated in Article VIII of the Constitutional Law do not require legislative approbation. A classification of these is quite impossible, but the following may serve to illustrate their varied character: The general treaty signed at Berlin July 13, 1878, for the settlement of affairs in the East; the treaties of May 24, 1881, and March 10, 1883, with the same powers, rectifying the Turko-Grecian frontiers, and relative to the navigation of the Danube;[5] the treaty signed at Constantinople October 29, 1888, for the neutralization of the Suez Canal;[6] the international sanitary convention signed at Dresden April 15, 1893;[7] the agreement reached with Great Britain by exchange of declarations at London August 5, 1890, by which the French government engaged to recognize the British protectorate over the islands of Zanzibar and Pemba, and the British government to recognize the French protec-

[1] De Clercq's *Recueil des Traités*, vol. xxi, p. 660.
[2] *Ibid.*, vol. xxi, p. 386.
[3] *Ibid.*, vol. xviii, p. 155; vol. xxi, p. 51.
[4] *Ibid.*, vol. xviii, p. 289.
[5] *Ibid.*, vol. xiii, p. 32; vol. xiv, p. 178.
[6] *Ibid.*, vol. xviii, p. 144.
[7] *Ibid.*, vol. xx, p. 27.

torate over the island of Madagascar and a French influence over certain portions of Africa;[1] and the declaration signed with Great Britain January 15, 1896, mutually limiting their respective spheres of influence in the region of Siam.[2]

Belgium

By Article LXVIII of the Belgian constitution (1831), the King makes treaties of peace, alliance and commerce, reporting to the chambers as soon as the interest and safety of the state permit. Treaties of commerce and those that may burden the state or bind Belgians individually have effect only after having received the assent of the chambers. No cession, no exchange, no addition of territory may take place except by virtue of a law. In no case may secret articles be destructive of the open.[3]

The approval of the chambers is given by a law authorizing the execution of the treaty, and in practice precedes the exchange of ratifications. The law does not expressly authorize the ratification, but provides that the treaty shall be given full effect.[4] While the function of the chambers is primarily to give effect to the treaty, its action preceding the ratification expresses an approval of the treaty. The law being of this nature, it was the earlier practice of the King to withhold his sanction to it until the exchange of ratifications of the treaty had been perfected, the date of the law thus following that act. The exchange of ratifications of the treaty of com-

[1] De Clercq's *Recueil des Traités*, vol. xviii, p. 578.

[2] *Ibid.*, vol. xx, p. 361.

[3] J. B. Lanckman, *Code des Relations extérieures de la Belgique*, p. 665. *Brit. and For. State Papers*, vol. xviii, p. 1058; vol. lxxxv, p. 783.

[4] "*Sortira son plein et entier effet.*"

merce with China, signed November 2, 1865, took place at Shanghai, October 27, 1866, while the law by which the chambers expressed approval is dated January 3, 1867. The law, however, was adopted by the Chamber of Representatives February 25, 1866, and by the Senate March 6, 1866.[1] Ratifications of the treaty of commerce with Great Britain, signed July 23, 1862, were exchanged August 30, the approbatory law of August 31 having been passed by the Chamber of Representatives August 13 and by the Senate August 21;[2] those of the treaty of commerce with the United States, signed March 8, 1875, were exchanged June 11, the law of June 14, approving it having been adopted by the Chamber of Representatives June 1 and by the Senate June 3;[3] those of the treaty of commerce with Spain, signed May 4, 1878, were exchanged July 23, the approbatory law of July 25 having been adopted by the Chamber of Representatives May 16 and by the Senate May 19, 1878.[4] With respect to the more recent treaties of commerce, as for instance those concluded May 25, 1895, with Greece, June 7, 1895, with Mexico, and June 22, 1896, with Japan, the laws have been sanctioned by the king prior to the exchange of ratifications.[5]

General laws regulating matters normally subject to international agreement often contain provisions authorizing the King to enter into treaties with foreign states

[1] Lanckman's *Traités de Commerce et de Navigation entre la Belgique et les Pays étrangers*, p. 63.

[2] *Ibid.*, p. 189. [3] *Ibid.*, p. 131.

[4] *Ibid.*, p. 111. See also *ibid.*, pp. 9, 21, 51, 267, 295, 318.

[5] Busschere, *Code de Traités et Arrangements internationaux intéressant la Belgique*, vol. ii, pp. 241, 289, 270, 581. See for other important treaties of commerce concluded since 1890, in which this procedure was followed, *ibid.*, pp. 146, 191, 206, 302, 415.

on condition of reciprocity, and to apply the law in execution of them. Treaties concluded on this authority, though otherwise subject to legislative action, are not submitted to the chambers. Such provisions may be found in the following laws: January 5, 1855, for the restitution of deserting seamen;[1] March 15, 1874, for the extradition of criminals;[2] April 1, 1879, for the protection of trade-marks;[3] November 27, 1891, for the return of indigents,[4] and the special law of January 30, 1892, for the extension, on condition of reciprocity, of the most-favored-nation treatment in matters of commerce, navigation and duties.[5]

Of those that may burden the state, *i. e.*, may impose financial obligations, the treaty of July 3, 1890, with the state of the Congo, relative to a loan to be made by Belgium, may be mentioned.[6] The restriction on treaties affecting territorial jurisdiction includes such boundary agreements as necessitate an exchange of territory, such for instance as the conventions signed with France, March 15, 1893, and with the Netherlands, January 11, 1892.[7] The union with the Congo being only personal, the treaties entered into by the King as sovereign of that state are in no way affected by this article of the Belgian constitution. As a permanently neutralized state under Article VII of the treaty concluded at London April 19, 1839, Belgium is not at liberty to enter into treaties which may lead to hostilities except in defense of her own frontiers, or which may otherwise

[1] Art. II. *Ibid.*, vol. ii, p. 464.

[2] Arts. I and VI. *Ibid.*, vol. i, pp. 575, 578. Moore, *Extradition*, vol. i, pp. 705, 708.

[3] Art. XIX. Busschère, *Code de Traités, etc.*, vol. ii, p. 481.

[4] Art. XXVIII. *Ibid.*, vol. ii, p. 440. [5] *Ibid.*, vol. ii, p. 456.

[6] *Ibid.*, vol. i, pp. 290, 291. [7] *Ibid.*, vol. i, pp. 174, 264. See note.

compromise her neutrality. Thus in the treaty of May 11, 1867, signed by Belgium and most of the other states of Europe, declaring the neutralization of Luxemburg, Belgium, as "a neutral state," is specifically excepted from the duty, incurred in Article II, of guaranteeing this neutrality.[1]

The Netherlands

Article LIX of the constitution of the Netherlands, as revised in 1887, provides that the King shall make and ratify all treaties concluded with foreign powers, communicating the purport of them to the two chambers of the States-General when he thinks the interest of the state permits. Treaties that provide for a change of territory of the state, that impose on the kingdom pecuniary obligations, or that contain any other provision concerning legal rights (*droits légaux*) may be ratified by the King only after the approval of the States-General.[2]

The limitation as to treaties providing for a change of the territory of the state has been applied to those affecting colonial possessions. This construction is in conformity with the express provisions of Article LVII of the original constitution of 1848. In the conventions signed November 29, 1888, with France, submitting to arbitration the disputed boundary between Dutch and French Guiana; June 20, 1891, with Great Britain, determining boundaries in the island of Borneo; and May 16,

[1] Busschère, *Code de Traités*, etc., vol. i, p. 63. *Luxemburg*—Art. XXXVII of the constitution of Luxemburg (1868) is similar in wording to Art. LXVIII of the constitution of Belgium. A clause is added which requires in general the approval of the legislative branch of all treaties bearing upon a matter which can be regulated only by a law. *Brit. and For. State Papers*, vol. lviii, p. 253.

[2] Tripels, *Code Politique des Pays-Bas*, p. 10.

1895, with Great Britain, defining boundaries between possessions on the island of New Guinea, clauses were inserted making the ratification dependent upon the approval of the States-General.[1]

Included by practice under treaties imposing a pecuniary obligation, are not only those that expressly stipulate for a payment, but also those of which an expenditure is a necessary or implied consequence. Such, for instance, are the conventions with Belgium for the improvement of international canals,[2] and the convention with Great Britain of May 16, 1895, submitting to arbitration the "Costa Rica Packet" dispute.[3] Under treaties "which contain any other provision concerning legal rights" ("*qui contiennent quelque autre disposition concernant des droits légaux*"), there are included, according to Professor L. de Hartog, those that touch upon such subjects as may be regulated only by means of legislation.[4] It is specifically provided in the constitution that foreigners may be naturalized only by law;[5] that the admission and expulsion of foreigners, and the conditions on which treaties of extradition with foreign powers may be concluded, are to be regulated by law;[6] and that no impost or revenue can be established but by law.[7] Extradition is regulated by the general law of April 6, 1875, as modified by the law of April 15, 1886.[8] Treaties

[1] Arts. III, VIII and VI respectively. Lagemans' *Recueil des Traités et Conventions conclus par le Royaume des Pays-Bas*, vol. x, pp. 95, 356; vol. xii, p. 186.

[2] *Ibid.*, vol. viii, p. 204. [3] *Ibid.*, vol. xiii, p. 518.

[4] Marquardsen's *Handbuch des öffentlichen Rechts*, vol. iv, part 1, division 4, p. 83.

[5] Art. VI. [6] Art. IV. [7] Art. CLXXIV.

[8] Moore, *Extradition*, vol. i, p. 791. Tripels, *Code Politique*, p. 194. See naturalization law of Dec. 12, 1892, *Brit. and For. State Papers*, vol. lxxxiv, p. 663.

concluded in conformity with this act (and it specifically provides that no treaty shall be otherwise entered into) require no action on the part of the legislature for their execution, and are accordingly not submitted for approval. Of the more recent extradition treaties concluded and made effective without submission to the States-General are those signed May 31, 1889, with Belgium; November 4, 1893, with Russia; October 29, 1894, with Spain; December 31, 1896, with Germany; March 28, 1897, with Italy; and May 19, 1894, with Portugal.[1] The convention of March 20, 1883, for the protection of industrial property, which contained "provisions concerning legal rights," was approved by the law of April 23, 1884.[2] As illustrative of commercial treaties receiving legislative approval may be noted those signed July 12, 1892, with Spain;[3] April 9, 1895, with the Orange Free State;[4] and September 8, 1896, with Japan.[5]

ITALY

Article V of the Fundamental Statute promulgated for Sardinia, March 4, 1848, and subsequently extended to the various parts of the present kingdom, provides: "To the King alone belongs the executive power. He * * * declares war; makes treaties of peace, alliance, commerce, and other treaties, communicating them to the chambers as soon as the interest and safety of the

[1] Lagemans' *Recueil des Traités*, vol. x, p. 118; vol. xii, pp. 64, 154; vol. xiii, pp. 230, 294; vol. xii, p. 107; vol. xiii, p. 512.

[2] Tripels, *Code Politique*, p. 238.

[3] Approved by law of July 24, 1893. Exchange of ratifications Dec. 11.

[4] Approved by law of April 9, 1897. Exchange of ratifications June 26.

[5] Approved by law of May 2, 1897. Exchange of ratifications Aug. 20. Lagemans' *Recueil des Traités*, vol. xii, p. 346; vol. xiii, pp. 214, 517.

state permit, accompanying such notice with opportune explanations; provided that treaties involving financial obligations or change of state territory shall not take effect until they have received the consent of the chambers."[1]

According to a strict construction of this article, the two specified classes of treaties alone would require the consent of the chambers to make them effective. Treaties of commerce, since they are specified among those within the competency of the King to make, and are omitted in the clause that closely follows specifying those for which the consent of the chambers is necessary, would logically be excluded from this category unless considered to involve the finances of the state. In practice, however, treaties of commerce, as well as all treaties touching upon matters legally belonging to parliament, are submitted to that body prior to their ratification.[2] Its approval is given by a law authorizing the carrying into effect of the treaty, passed prior to the ratification, but not usually sanctioned by the King until the exchange of ratifications, which frequently takes place on the same day. This was the case with respect to the important treaties of commerce concluded March 22, 1883, with Switzerland; May 4, 1883, with Germany; June 15, 1883, with Great Britain; December 6, 1891, with Austria-Hungary and Germany; April 19, 1892, with Switzerland; and December 1, 1894, with Japan.[3] A provisional

[1] *Annals of the American Academy of Political and Social Science*, vol. v, supplement p. 27. See Italian text, Lowell, *Governments and Politics in Continental Europe*, vol. ii, p. 347.

[2] Prof. Brusa of the University of Turin, Marquardsen's *Handbuch des öffentlichen Rechts*, vol. iv, pt. 1, div. 7, p. 490.

[3] *Trattati e Convenzioni fra il Regno d' Italia e gli altri Stati*, vol. ix, pp. 200, 231, 273. *Raccolta Ufficiale delle Leggi e dei Decreti del Regno d' Italia, 1892*, pp. 46, 1639; *1895*, p. 3030.

agreement with Spain, reached by exchange of notes June 29, 1892, extending on the part of the Italian government to Spanish products the advantages of the conventional tariff contained in the treaties with Austria-Hungary, Germany and Switzerland, and on the part of the Spanish government, to Italian products the minimum tariff, was authorized by the special law of June 28, the day preceding the exchange of notes.[1] The reciprocity convention with the United States, signed February 8, 1900, expressly provided that it should be approved by the Italian Parliament. Approval was given by the law of July 12; and the agreement became effective July 18. In the United States it was made effective by executive proclamation by virtue of section 3 of the tariff act of July 24, 1897.[2]

The class of commercial treaties submitted to the chambers for approval does not include purely consular conventions. Thus on September 28, 1896, separate treaties were signed with Tunis through the government of France, one relative to commercial intercourse, and another defining the duties and privileges of consuls. The former was approved by the law of January 28, 1897, while the latter was ratified and put into force by by a royal decree.[3] Extradition conventions are likewise not submitted to Parliament for approval.

The important modification of territorial limits stipulated for in the treaty of Turin of March 24, 1860—the cession to France of Nice and Savoy—received the approval of the Italian Parliament.[4] Of the various boundary agreements with Switzerland, the less import-

[1] *Brit. and For. State Papers*, vol. lxxxiv, p. 1318.

[2] *Trattati e Convenzioni*, vol. xvi, p. 162.

[3] *Ibid.*, vol. xiv, pp. 314, 337.

[4] See Art. VII.

ant ones have been made and ratified on executive authority. The limitation has also not been construed as applying to changes of colonial boundaries or to the acquisition or relinquishment of protectorate influences. Of these may be noted the treaties of May 2, 1889, and October 26, 1896, with the king of Abyssinia. By the former favorable boundaries and a protectorate influence were acquired,[1] by the latter, yielded.[2]

Laws were passed for the execution of the postal-union conventions signed at Vienna, July 4, 1891, and at Washington, June 15, 1897.[3] The act additional to the Paris convention of March 20, 1883, for the protection of industrial property, signed at Brussels, December 14, 1900; and the act additional to the Madrid agreement of April 14, 1891, signed at Brussels, December 14, 1900, were both approved by laws of December 12, 1901, prior to the exchange of ratifications, June 14, 1902.[4] Special conventions upon these subjects, which do not for their execution require a modification of the existing laws, require no action on the part of Parliament.[5] The telegraphic convention signed at Budapest, July 22, 1896, was ratified and promulgated by decree without special legislative approval.[6]

The convention signed, March 18, 1885, with the leading powers of Europe guaranteeing an Egyptian loan;

[1] Art. XVII.

[2] Hertslet's *Map of Africa by Treaty*, p. 12. *Brit. and For. State Papers*, vol. lxxxviii, p. 481. *Trattati e Convenzioni*, vol. xiv, p. 356.

[3] *Leggi, etc., 1892*, p. 1805. *Trattati e Convenzioni*, vol. xv. p. 128.

[4] *Ibid.*, vol. xvi, p. 204.

[5] The special postal agreements signed July 11, 1896, with Great Britain; Mar. 23, 1898, with Tunis; Apr. 26, 1898, with Costa Rica, and Oct. 18, 1898, with Montenegro, were not approved by Parliament. *Ibid.*, vol. xiv, p. 172; vol. xv, pp. 386, 390, 430.

[6] *Ibid.*, vol. xiv, p. 269.

while not specifically stipulating for a payment of money, involved a possible pecuniary obligation. The consent of Parliament was given by a law of November 25, 1886, which authorized the King to give effect to the convention in conjunction with the other contracting powers in so far as there might arise eventually any charges upon the treasury.[1] The claims convention signed with Chile, December 7, 1882, providing for the settlement of claims of Italian subjects against the Chilian government, did not require legislative sanction.[2]

There remains within the competency of the King the conclusion of all the so-called political conventions. Of these, especially to be noted are the treaties of alliance. While the clause requiring the concurrence of Parliament in treaties involving financial obligations has received so comprehensive a construction, the King through his power to conclude treaties of alliance may incur the most onerous obligations of that character. It would be impossible to find in the list of treaties four others that have entailed greater financial burdens than the alliances entered into in 1855 against Russia, in 1858 with France against Austria, in 1866 with Prussia against Austria, and in 1882 with Germany and Austria—the Triple Alliance. The expense of a war was an immediate consequence of each of the first three, and a burden hardly less great has resulted from the fourth.

GERMANY

Article XI of the constitution of 1871 provides that the Emperor has the power to represent the Empire internationally, to enter into alliances and other treaties with foreign powers; but so far as treaties with foreign

[1] *Brit. and For. State Papers*, vol. lxxvii, p. 817.

[2] *Trattati e Convenzioni*, vol. ix, p. 76.

countries refer to matters which, according to Article IV, belong in the field of imperial legislation, for their conclusion the consent of the Bundesrath is necessary, and for their validity the approval of the Reichstag.[1]

The Bundesrath, or Federal Council, as organized in the constitution, consists of 58 members apportioned among the states somewhat arbitrarily, and appointed by the several state executives.[2] The members of the Reichstag are apportioned according to population, and are elected by direct vote of the people.

In a study of the formation of the constitution of the North German Union, which, with the alterations made necessary by the establishment of the German Empire in 1871, serves as the present constitution, the proceedings of two separate bodies are to be considered—the convention of delegates from the several state executives, and the convention of representatives of the people—which assembled at Berlin in 1866–7. The former drew up a plan of a constitution which, after having been amended in numerous particulars by the convention of the people, was adopted and submitted to the several states for ratification.[3] The original Prussian project

[1] "Der Kaiser hat das Reich völkerrechtlich zu vertreten, im Namen des Reichs Krieg zu erklären und Frieden zu schliessen, Bündnisse und andere Verträge mit fremden Staaten einzugehen, Gesandte zu beglaubigen und zu empfangen. * * * Insoweit die Verträge mit fremden Staaten sich auf solche Gegenstände beziehen, welche nach Art. 4 in den Bereich der Reichsgesetzgebung gehören, ist zu ihrem Abschluss die Zustimmung des Bundesrathes und zu ihrer Gültigkeit die Genehmigung des Reichstages erforderlich." *Reichsverfassung*, Art. XI. English translation, Larned, *History for Ready Reference*, vol. i, p. 549.

[2] Of the 58, Prussia has 17, Bavaria 6, Saxony 4, Wurtemberg 4, Baden 3, Hesse 3, Mecklenburg-Schwerin 2, Brunswick 2, and the others 1 each. Art. VI.

[3] Burgess, vol. i, p. 116.

considered the right to conclude treaties a prerogative of the President of the Union, subject to the qualification that treaties of commerce and navigation should be submitted to the Bundesrath for approval. The representatives of the states in their deliberations so modified the provision as to require the consent of the Bundesrath to the conclusion of all treaties touching upon matters in the field of legislation. To this the representatives of the people added, without entering into any explanation, the further condition that for their validity the approbation of the Reichstag should be necessary.[1]

The question has been much mooted by German writers whether the action of the Reichstag is essential to the validity of the treaty as an international compact, or is only requisite in the execution of the treaty so far as it relates to matters which can be regulated only by legislation. Of the advocates of the latter view is the eminent jurist Laband.[2] However this may be, the usual procedure is to withhold the ratification of such treaties until the Bundesrath and the Reichstag have both acted upon them.[3] Enumerated in Article IV as under the imperial superintendence and legislation are the protection of literary and industrial property, commerce, customs duties, citizenship, and postal, telegraphic and

[1] Laband, *Das Staatsrecht des deutschen Reichs* (1901 ed.), vol. ii, p. 125. Meier, *Abschluss von Staatsverträgen*, p. 268.

[2] *Das Staatsrecht des deutschen Reichs*, vol. ii, p. 136. See Meier, p. 275. Von Mohl, *Das deutsche Reichsstaatsrecht*, p. 303. Von Rönne, *Das Staatsrecht des deutschen Reichs*, p. 298.

[3] Laband, vol. ii, p. 130. Meier, p. 284. Laband notes as exceptions the treaties of Dec. 16, 1878, with Austria, and of July 12, 1883, and Dec. 30, 1893, with Spain, which touched upon matters regulated by legislation, and which were ratified by the Emperor before they had been acted upon by the Reichstag. Vol. ii, p. 136.

railway matters.[1] The separate states of the Empire may conclude with each other conventions of an administrative character in reference to postal and telegraphic affairs,[2] the collection of customs and excises, the determination of contested jurisdiction, and similar matters when not regulated by imperial legislation. Extradition with foreign countries, so far as not covered by the imperial law or treaties, may be regulated by the states.[3]

AUSTRIA–HUNGARY

Treaties are negotiated by the Emperor through the joint Minister for Foreign Affairs. The latter consults the premiers of the two states and is subject to the interpellations of the dual delegations. The Act of Union provides in section 8 of Law XII as passed in 1867 by the Hungarian Parliament, and in section 1 of the Fundamental Law concerning joint affairs[4] of December 21, 1867, as passed by the Austrian Reichsrath, that the approval of treaties, in so far as the constitutions of the two states require, is reserved to the respective legislatures, *i. e.*, the Austrian Reichsrath and the Hungarian Parliament.[5] It is, therefore, necessary to look to the constitutions of the two countries in order to determine what treaties, if any, require legislative approval.

The five Fundamental Laws of December 21, 1867, form the body of the Austrian constitution. By article 6 of the Fundamental Law concerning the exercise of executive power the Emperor concludes treaties; but to the validity (*Gültigkeit*) of commercial treaties and those

[1] Subject in Bavaria to Art. XLVI.

[2] See reservation in Art. XLVIII.

[3] Moore, *Extradition*, vol. i, p. 726.

[4] R. G. B. 146.

[5] *Oesterreich, Gesetze*, vol. xix, p. 101, and supplement p. 83.

that burden (*belasten*) the state or a portion of it, or impose obligations (*verpflichten*) on individual subjects, the consent of the Reichsrath is necessary.[1] Section 11 of the law concerning imperial representation also enumerates, among the duties of the Reichsrath, the examination and approval of treaties of commerce, and all treaties that burden (*belasten*) the kingdom or a part of it, or bind (*verpflichten*) individual subjects, or have for their object territorial changes in the kingdoms and lands represented in the Reichsrath.[2]

The constitution of Hungary is not contained in any single document, but is made up of laws and charters some of which are of early date. According to Hungarian writers, all treaties which may change the internal organization of the state, or touch upon the rights of the legislature to concur in levying taxes, in making expenditures or in furnishing recruits, or which may cause a change of territory, require the approval of Parliament.[3]

The commercial relations between the two countries are regulated by an agreement commonly called the *Ausgleich*, entered into in accordance with section 2 of the Fundamental Law and Act of Union of Austria, and section 61 of the Hungarian Law XII. As entered into in 1867, it was subject to termination at the end of every ten years; but it was with modifications successively renewed until 1897. On the failure of the Austrian Reichsrath to provide for its renewal in that year, it was provisionally extended by decrees of the Emperor. This agreement provides that while it continues the two countries shall form a customs and commercial union. Treaties

[1] R. G. B. 145, *ibid.*, p. 100. [2] R. G. B. 141, *ibid.*, p. 42.

[3] Ulbrich, *Marquardsen's Handbuch des öffentlichen Rechts*, vol. iv, pt. 1, div. 1, p. 150.

which have for their object the regulation of commercial relations abroad, especially commercial, tariff, navigation, consular, postal and telegraphic treaties, shall be equally binding on the territories of the two states. The negotiation and conclusion of such treaties, after the constitutional consent of both legislatures, shall take place through the Minister of Foreign Affairs on the basis to be agreed upon between the ministers for the proper department of the two countries.[1]

Sweden and Norway

The treaty-making power in Sweden and Norway is determined by the Act of Union of 1815, and by the separate constitutional provisions of the two countries. By Article IV of the Act of Union the King has the power to make peace, to conclude or dissolve treaties, and to send and receive ministers.[2] The power of the King in this respect is defined in similar terms in Article XXVI of the constitution of Norway (1814).[3] In Article XII of the Swedish constitution (1809), it is provided that the King can enter into treaties and alliances with foreign powers, after having ascertained the opinion of the Minister of State for Foreign Affairs and of the Chancellor of the Court.[4] Negotiations not only for Sweden alone, but also for the united kingdoms are accordingly conducted on the advice of the Swedish minister. In those, however, touching matters which concern both countries or Norway alone, the Norwegian minister, who with two councillors represents Norway

[1] Art. III. *Gesetze*, vol. xix, pp. 325, 326.

[2] Martens' *Nouveau Recueil des Traités*, vol. ii, p. 612.

[3] Text, Larned's *History for Ready Reference*, vol. i, p. 569.

[4] *Ibid.*, vol. i, p. 581.

in the common council of state at Stockholm, is admitted into the ministerial council in which diplomatic affairs are discussed.

Norway has of recent years often requested the negotiation of separate treaties. In those affecting matters subject to internal regulation, the request has frequently been complied with. Postal and telegraphic conventions have been thus concluded. In 1886 two parcel-post conventions were signed at London with Great Britain—March 12 applying to Norway, and March 16 applying to Sweden.[1] The postal-union convention concluded at Washington June 15, 1897, and the international telegraphic agreement concluded at Budapest July 22, 1896, were signed by different representatives on the part of Norway and Sweden.[2] To the protocol of the conference on private international law concluded at The Hague July 13, 1894, separate plenipotentiaries subscribed.[3] Separate extradition treaties have of late usually been concluded.[4] Since the Act of Union did not make of the two kingdoms a customs union, commercial relations between the two are subjected to local regulation. A commercial agreement in the form of an identical law, which had the sanctity of a treaty, was reached in 1874. In 1887 it was altered, and in 1890 finally superseded by a new agreement reciprocal in nature, but still placing barriers to free intercourse between the two countries. In accordance with its provisions this agreement was terminated by Sweden July

[1] *Brit. and For. State Papers*, vol. lxxvii, pp. 82, 1161.

[2] *Ibid.*, vol. lxxxix, pp. 84, 85; vol. lxxxviii, pp. 1178, 1179.

[3] *Ibid.*, vol. lxxxvii, p. 136.

[4] The United States has separate treaties, with Sweden signed Jan. 14, and with Norway June 7, 1893.

12, 1897.[1] As the two countries do not form a customs union, separate commercial treaties may be negotiated. Such treaties were concluded: June 27, 1892, with Spain, applying to Sweden alone;[2] March 22, 1894, with Switzerland,[3] and December 31, 1895, with Portugal,[4] applying solely to Norway. On June 11, 1895, two separate and different treaties of commerce were signed with Belgium, the one applying to Norway, the other to Sweden.[5] The treaty of January 13, 1892, with France, for the extension in part of the existing treaties of commerce, and the general treaty of amity and commerce of May 2, 1896, with Japan,[6] applied, however, to both kingdoms. In connection with the latter some dissatisfaction was shown in the Norwegian Storthing, as a separate treaty had been desired; and, although the treaty was not rejected, a motion for a declaration of disapproval produced a tie vote.[7]

Article I of the constitution of Norway and Article LXXVIII of the constitution of Sweden, which provide that the territory of the respective kingdoms cannot be alienated, stand as absolute limitations on the King in treaty-making. Norwegian troops can be employed in an offensive war only with the consent of the Storthing.[8] According to the constitution of Sweden no taxes of any description whatever can be increased without the express consent of the estates,[9] and no loans within or without the kingdom, or financial burden, can be con-

[1] *Brit. and For. State Papers*, vol. lxxviii, p. 417; vol. lxxxii, p. 759; vol. lxxxvii, p. 766.

[2] *Ibid.*, vol. lxxxiv, p. 113.

[3] *Ibid.*, vol. lxxxvi, p. 1024.

[4] *Ibid.*, vol. lxxxvii, p. 534.

[5] *Ibid.*, vol. lxxxvii, pp. 493, 834.

[6] *Ibid.*, vol. lxxxiv, p. 110; vol. lxxxviii, p. 451.

[7] *Annual Register 1897*, p. 341.

[8] Art. XXIII, title 2.

[9] Arts. LX and LXXIII.

tracted without this consent.[1] Similar provisions are found in the constitution of Norway.[2] These provisions in the constitutions, directly limiting the power of the King in the execution of treaties affecting the revenue laws, has tended to develop a practice of submitting such treaties for legislative approval.[3] In each of the above-mentioned treaties for commercial reciprocity, applying to Norway alone, a clause was inserted expressly providing for the approval of the Norwegian legislature. Likewise the joint treaty with France for the extension in part of existing commercial treaties was concluded subject to the approval of the representatives in Sweden and Norway.[4]

Denmark

By Article XVIII of the constitution of Denmark (1849, revised in 1866) the King concludes peace, alliances and commercial treaties, but he cannot, without the consent of the Rigsdag, give up any part of the country or enter into any engagement whereby the existing public-law relations will be changed.[5] The original article (XXIII) in the constitution of 1849 was more definite, requiring the consent of the Rigsdag to treaties ceding any portion of territory, disposing of any of the revenues of the state, or incurring charges on the state.[6]

[1] Art. LXXVI. [2] Art. XXVII, title 3.

[3] Aschehoug, *Marquardsen's Handbuch des öffentlichen Rechts*, vol. iv, pt. 2, div. 2, pp. 18, 19.

[4] Art. IV. *Brit. and For. State Papers*, vol. lxxxiv, p. 111.

[5] *Brit. and For. State Papers*, vol. lviii, p. 1235. German text, *Marquardsen's Handbuch des öffentlichen Rechts*, vol. iv, pt. 2, div. 3, p. 74.

[6] The expression "public-law relations" ("*die staatsrechtlichen Verhältnisse*") has been construed by Danish writers to stand in opposition to international relations and embrace all internal relations as dis-

It is within the competency of the King to conclude definitively postal and telegraphic conventions, extradition treaties and the usual treaties of amity and commerce.[1] The restriction on ceding a part of the country has been applied also to a cession of colonial possessions. Thus the treaty signed January 24, 1902, with the United States for the cession of the Danish West Indies required for its ratification the consent of the Rigsdag, and remains unperfected through the refusal of that body to give its sanction.

Spain

The King declares war, makes peace, and conducts diplomatic and commercial relations with other powers;[2] but he must be authorized by a special law: "1. To alienate, cede or exchange any part of Spanish territory. 2. To incorporate any other territory into Spanish territory. 3. To admit foreign troops into the kingdom. 4. To ratify treaties of alliance, offensive and defensive, those which specially relate to commerce, those which stipulate for the granting of subsidies to any foreign power, and all those which may be binding individually on Spaniards. In no case can secret articles of a treaty annul public ones."[3] As clearly expressed in the article the law must precede the ratification. In the negotiations for peace with the United States in 1898, the Spanish government considered a law necessary, before entering into the final negotiations at Paris, for the cession of

tinguished from the external relations which result from the mutual contact of states and which are usually regulated by treaty stipulations. *Ibid.*, p. 75.

[1] *Marquardsen's Handbuch*, p. 75.

[2] Art. LIV, sections 4 and 5 of the constitution of 1876.

[3] Art. LV. *Brit. and For. State Papers*, vol. lxvii, p. 125.

territory embraced in the protocol of August 12. Accordingly a law was passed by the Cortes in secret session in September authorizing the cession.[1]

PORTUGAL

In Article LXXV of the original constitution of Portugal of 1826, the King retained the treaty-making power with the sole express limitation that treaties concluded in time of peace, stipulating for a cession or exchange of territory, should be approved by the Cortes. The article is completely changed by Article X of the act of amendment of July 5, 1852, which provides that every treaty, concordat and convention shall, before ratification, be submitted for the approval of the Cortes in secret session.[2]

SWITZERLAND

In the constitution of Switzerland (1874), the power to make alliances and treaties for the Confederation is given to the Federal Assembly,[3] the national legislative body composed of the National Council and the Council of States. The negotiations are conducted by the Federal Council,[4] the national executive body consisting of seven members elected by the Assembly.[5] The right of making peace and of concluding treaties with foreign powers, particularly treaties relating to tariffs and commerce, is expressly delegated to the Confederation;[6] but

[1] *Annual Register, 1898*, p. 54.

[2] *Brit. and For. State Papers*, vol. I, p. 1276; vol. xiii, p. 968.

[3] Art. LXXXV, sec. 5. [4] Art. CII, sec. 8.

[5] The business of the Federal Council is distributed among seven departments, one of which is that of foreign affairs. Each of these is presided over by one of the Councillors. All decisions however emanate from the Council, four of the members of which must concur in order to render a valid decision. Winchester, *The Swiss Republic*, p. 97.

[6] Art. VIII.

the cantons retain the power to make among themselves conventions upon legislative, administrative or judicial subjects,[1] and to conclude with foreign powers treaties respecting the administration of public property, and border and police intercourse.[2] Treaties of a political character are specifically prohibited to the cantons;[3] and every agreement entered into by a canton is subject, on the protest of the Federal Council or another canton, to the approval of the Federal Assembly.[4] It is the function of the Federal Court in cases within its jurisdiction to apply the laws and resolutions of the Federal Assembly, and to "conform to treaties which shall have been ratified by the Federal Assembly."[5] The general extradition law of January 22, 1892, places extradition in the hands of the Federal Council, and authorizes it to conclude treaties in conformity with the provisions of the act.[6]

In the matter of a naturalization treaty it has been doubted whether the powers of the central government authorize it to recognize by treaty the right of expatriation.[7] Upon the general question of the treaty-making power of the Confederation, the conclusion has been reached, says Professor Moses, "that the limitation of powers drawn between the Union and the cantons with respect to internal affairs does not define the powers of the Union with respect to foreign relations."[8] By the

[1] Art. VII. [2] Art. IX. [3] Art. VII.

[4] Art. LXXXV, sec. 5. Text, Larned's *History for Ready Reference*, vol. i, p. 588. See for instances of cantonal agreements, Vincent, *Government in Switzerland*, p. 201.

[5] Art. CXIII. [6] *Brit. and For. State Papers*, vol. lxxxiv, p. 671.

[7] *For. Rel. of U. S. 1897*, p. 557.

[8] *Federal Government of Switzerland*, p. 171. See also to the same effect Blumer, *Handbuch des schweizerischen Bundesstaatsrechtes*, vol. i, p. 204.

original constitution the powers of the central government extend to the protection of literary and artistic property, and by an amendment of 1887, to the protection of patents.[1] The posts and telegraphs are controlled by the Confederation.[2] Switzerland is subject to the limitations of a neutralized state.

GREECE.[3]

In Greece the King makes treaties of peace, alliance and commerce; but treaties of commerce and all others that include concessions which require, according to other provisions of the constitution, the sanction of a law, or which may burden the Greeks individually, are not effective until the assent of the Boule, the single-chambered Greek legislature, has been given.[4] A cession or exchange of territory can be made only by virtue of a law.[5]

[1] Art. LXIV. [2] Art. XXXVI.

[3] In Servia, according to the constitution of 1869, which was reproclaimed in 1894, the Prince concludes treaties with foreign powers, but if the execution of the treaty should involve a charge on the treasury or a modification of existing laws, or affect public or private rights, the assent of the legislature is necessary. Art. VIII. The Prince of Roumania concludes with foreign states conventions of commerce and others of the same nature, but that these may have obligatory force they must be submitted to and approved by the legislature. Art. XCIII of the constitution of 1866 as amended in 1879 and 1884. *Brit. and For. State Papers*, vol. lxi, p. 1071; vol. lvii, p. 273; vol. lxxv. p. 1106. In both countries the territory of the state is declared inalienable. Art. II. In Roumania the boundaries can be changed or rectified only by virtue of a law (Art. II); in Servia, if the modification is of little importance, only with the consent of the National Assembly, and if it is of real importance, the consent of the Grand National Assembly, the sovereign power of the state, is necessary. Art. II.

[4] Art. XXXII of the constitution of 1864.

[5] Art. XXXIII. *Brit. and For. State Papers*, vol. lvi, p. 575.

Mexico and the South and Central American States

In Article LXXXV, section 10, of the original constitution of Mexico as adopted in 1857, it was provided that the President of the Republic should direct negotiations and conclude treaties, submitting them to the Federal Congress for ratification. By the amendments of 1874 the Federal Congress was divided into two branches, and to the upper branch, or Senate, was given, by amendment to Article LXXII, an exclusive power in the approval of all treaties and diplomatic conventions concluded by the Executive with foreign countries.[1] The States comprising the republic are prohibited from entering into alliances or treaties with other States or foreign powers. The frontier States may, however, unite with each other for offensive or defensive war against the Indians.[2]

In each of the remaining American states, treaties are negotiated by the President, but, with the exception of Cuba, require for their ratification the approval of the national legislature.[3] With the exception of Panama,

[1] *Brit. and For. State Papers*, vol. lxxviii, p. 994.

[2] Art. CXI, sec. 1.

[3] Brazil (*1891*), Arts. XLVIII, sec. 16, and XXXIV, sec. 12; Argentine Republic (*1862*), Arts. LXXXVI, sec. 14, and LXVII, sec. 19; Chili (*1833*), Art. LXXIII, sec. 19; Bolivia (*1880*), Art. LXXXIX, sec. 1; Peru (*1860*), Arts. XCIV, sec. 11, and LIX, sec. 16; Ecuador (*1896*), Art. XCIV, sec. 6; Colombia (*1886*), Art. CXX, sec. 10; Venezuela (*1893*, *1901*), Art. LIV, sec. 16; Uruguay (*1829*), Art. XVII, sec. 7; Paraguay (*1870*), Arts. CII, sec. 12, and LXXII, sec. 18; Panama (*1904*), Art. LXXVIII, sec. 8; Costa Rica (*1871*), Art. CII, sec. 9; Salvador (*1886*), Art. XCI, secs. 6 and 7; Nicaragua (*1894*), Art. XCVIII, sec. 10; Guatemala (*1879*), Art. LXXVII, sec. 19; Honduras (*1894*), Art. CVIII, sec. 14; Dominican Republic (*reproclaimed 1896*), Art. XXV, sec. 17; and Haiti (*1889*), Art. CI.

the Dominican Republic, and the five Central American states, in which the national legislature consists of only one branch, the American bicameral legislature obtains. In Cuba, on the other hand, the approval of the Senate alone is required except in case of treaties of peace, which require the approval of Congress.[1] A permanent limitation on the treaty-making power of Cuba is recognized in Article I of the resolutions of the Congress of the United States accepted by the Cuban Constitutional Convention, June 12, 1901. It is there provided "That the government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes, or otherwise, lodgment in or control over any portion of said island."

Dependencies

Although the power to enter into treaties is a characteristic of sovereign states, semi-independent states, or communities, may be intrusted in a limited degree with its exercise. Egypt, while nominally a province of the Ottoman Empire, exercises this power on the authority of firmans granted by the Sublime Porte. The firman granted to the Khedive June 8, 1873, and renewed with slight changes August 2, 1879, and March 27, 1892, to his successors, authorizes the conclusion or renewal, without injury to the political treaties and sovereign rights of the imperial government, of conventions for tariff rates and commerce, and for regulating the protection of foreigners and their relations with

[1] (*1901*) Arts. LXVIII, sec. 7, and LIX, sec. 12.

the government and population of Egypt.[1] Besides numerous special postal and telegraphic conventions, Egypt is a signatory party to the universal postal conventions signed at Vienna July 4, 1891, and at Washington June 15, 1897, and to the international telegraphic convention signed at Budapest July 22, 1896. Several treaties guaranteeing judicial reform have been entered into. On March 3, 1884, there was signed at Cairo a commercial treaty with Greece which, after providing for reciprocal most-favored-nation treatment, regulated in some detail the tariff rates to be levied on Greek imports into Egypt. This treaty formed the basis of treaties subsequently concluded with Great Britain, the United States, Italy, Portugal, the Netherlands, Sweden and Norway, and Belgium. Since the Khedive has no diplomatic representative at foreign courts, the treaties have usually been concluded in Egypt by the foreign government through a consul or commercial agent, and by the Khedive through his minister for foreign affairs. The powers of the latter are expressly restricted "within the limits of the powers conferred by the imperial firmans."

Bulgaria, although by the treaty of Berlin nominally a principality under the suzerainty of the Sultan, has concluded on its own responsibility numerous commercial conventions as well as those to facilitate international traffic, such as postal, telegraphic, railway and monetary conventions.[2] The only treaty of a political nature to which Bulgaria is a party, recorded in Ribier's *Répertoire des Traités (1879–1897)*, is the treaty of peace with Servia of March 3, 1886, and it is the only one that

[1] *Brit. and For. State Papers*, vol. lxiii, p. 33; vol. lxx, p. 297; vol. lxxxiv, p. 638.

[2] *Ibid.*, vol. lxxxviii, p. 371; vol. lxxix, pp. 5, 1144.

refers to the suzerainty of the Sultan. It was concluded and signed on the one hand by Bulgaria and the Sultan jointly, and on the other by Servia.[1]

[1] *Brit. and For. State Papers*, vol. lxxvii, p. 634. See for treaties establishing protectorates in Africa, in which the treaty-making power has been assumed by the suzerain, *ibid.*, vol. lxxii, p. 247; vol. lxxv, p. 10; Hertslet's *Map of Africa by Treaty*, vol. i, p. 14; vol. ii, pp. 763, 791, 995.

PART III

THE OPERATION OF TREATIES

I. Date of Taking Effect

The treaty is not definitively binding until the exchange of ratifications has taken place, and is accordingly not finally operative before that date.[1] If it is expressly provided that it shall go into effect immediately upon the signing, the operation of the treaty is entirely provisional, and acts done in execution of it depend for their ultimate validity upon the subsequent ratification.[2]

[1] Hall, *International Law* (4th ed.), p. 349.

[2] In the convention signed at Madrid, July 3, 1880, relative to the exercise of protection in Morocco, to which the United States is a signatory party, it was agreed that by the exceptional consent of the contracting parties the stipulations of the convention should take effect on the day on which it was signed. Art. XVIII. Mr. Evarts, Secretary of State, in a communication of Aug. 11, 1880, to the American negotiator, Mr. Fairchild, acknowledging the receipt of the convention, observed as to this stipulation that while this government could not accord validity to such an international compact in advance of the consent of the Senate, yet in view of the exceptional circumstances under which the convention had been framed and its limited operation within the territory of Morocco involving apparently no domestic legislation of this country, he deemed it entirely unlikely that any issue would arise pending formal ratification, which would call for diplomatic intervention on the part of our Executive in a sense opposed to the convention. *For. Rel. 1880*, p. 922. Likewise immediately after signing the treaty of July 15, 1840, for the pacification of the Levant, a protocol was signed by the negotiators providing that Art. II of the treaty should be put into execution without waiting for the exchange of ratifications. Hall, p. 348; Wheaton, sec. 264.

So far as a treaty affects individual rights, it takes effect when no contrary stipulation is made, upon the exchange of ratifications. A subsequent act on the part of the contracting parties may nevertheless be necessary to make it effective with respect to such rights.

As a compact between nations, a treaty dates, unless otherwise provided, from its signing, the exchange of ratifications having in this regard a retroactive effect.[1] Thus in the case of the cession of territory, the exercise of sovereignty by a ceding state ceases, except for strictly municipal purposes, with the signing.[2] The national character of the acquiring state is not, however, imposed for commercial purposes until the exchange of ratifications.[3] The union of possession and the right to the territory must concur "to give *plenum dominium et utile.*"[4] Although Porto Rico was ceded to the United States by a treaty signed December 10, 1898, and the authority of Spain was "superseded" by the previous military occupation of the United States, Porto Rico and the United States were, as to commercial matters, foreign countries until the exchange of ratifications.[5] As a fugitive has no vested right of asylum, the "principle that a treaty is not to be held to operate retroactively in respect to vested rights does not apply to conventions of extradition."[6]

[1] Heffter, sec. 87; Bluntschli, sec. 421; Davis *vs.* The Police Jury of Concordia, 9 How., 289; Haver *vs.* Yaker, 9 Wall., 32; *Treaties and Conventions*, p. 1228.

[2] Davis *vs.* The Police Jury of Concordia, 9 How., 289. United States *vs.* Arredondo, 6 Pet., 749.

[3] Twiss, *Law of Nations* (Rights and Duties in Time of Peace, 2nd ed.), p. 439.

[4] Mr. Justice Wayne, 9 How., 289.

[5] Mr. Justice Brown, Dooley *vs.* United States, 182 U. S., 223.

[6] Moore, *Extradition*, vol. i, p. 99.

As the legality of acts of hostility depends upon the belligerent right of the state, rather than of the individual, a treaty of peace, unless it otherwise provides, suspends hostilities from the date of its signature. Captures, as also recaptures, made thereafter even in ignorance of the signing of the peace, are accordingly to be restored, and damages committed are to be compensated as far as possible.[1] It is, however, the practice to precede the treaty of peace by an armistice, or by preliminary articles, which serve as the basis for the definitive treaty. Thus the treaty of Zurich was preceded by the preliminaries signed at Villafranca July 11, 1859; of Prague, by articles signed July 26, 1866; of Frankfort, by articles signed at Versailles February 26, 1871; of San Stefano, by articles signed at Adrianople January 31, 1878; of Paris, (1898), by the protocol signed at Washington August 12, 1898.

In England the courts have held that the officer through whose order an act of hostility is committed after the conclusion of peace, but in ignorance of it, is civilly liable, although if he acts in good faith the government must save him harmless. Such acts do not, however, entail criminal liability.[2] To forestall the inconveniences resulting from acts done in ignorance of the suspension of hostilities, a provision is usually inserted in the armistice or treaty postponing till a future day the operation of the peace in remote places. A capture made after the signing but in ignorance of it, and within the time thus specified, is good, unless provision is made for its restitution. In the treaty between Spain and the Low Countries signed at Münster, January 30, 1648, a period of a year

[1] Calvo, sec. 3155; Wheaton, sec. 547; Hall (4th ed.), pp. 581, 585. See, however, Halleck, vol. i, p. 317.

[2] Hall (4th ed.), p. 586; Wheaton, sec. 547.

was allowed for the receipt of the news of peace in the possessions of the East India Co., and a period of six months in those of the West India Co. Hostilities were, however, to cease in these places if advice of peace was received earlier.[1] With the modern facilities of communication, a much shorter period is required. In the armistice signed January 28, 1871, between France and Germany, provision was made for the cessation of military operations on the day of signing in Paris, and within three days in the departments.[2] Provision was also inserted for the restitution of captures. In the treaty of peace between China and Japan, signed April 17, 1895, it was agreed that offensive military operations should cease upon the exchange of ratifications, which did not take place till May 8.[3] The protocol between the United States and Spain of August 12, 1898, provided that hostilities should cease upon the signing of the protocol; and that notice to that effect should be given as soon as possible by each government to the commanders of its forces. Between the signing of the protocol and the receipt of the notice, occurred the capitulation, on August 14, of Manila to the American forces. Article III of the protocol provided that, pending the conclusion of a treaty of peace, the United States should occupy and hold Manila together with the bay and harbor. The Spanish government sought to maintain that the United States continued the occupation solely by virtue of this article, and that the capitulation of August 14 was "absolutely null by reason of its having been concluded after the belligerents had signed an agreement declaring the hos-

[1] Art. VII. *Collection of Treatys*, vol. ii, p. 340.

[2] Art. I. *Brit. and For. State Papers*, vol. lxii, p. 49.

[3] Art. X. *Ibid.*, vol. lxxxvii, p. 803.

tilities to be suspended." The government of the United States was unable to concur in this view, and took the ground that, as it had been expressly provided in the protocol that notice should be given of the suspension of hostilities, the suspension was to be considered as having taken effect "at the date of the receipt of the notice," which had been immediately given.[1] While this seems to be a natural construction of the article—otherwise the clause providing for the immediate notification is redundant—the Spanish government was not inclined to accept it; and in the first conference of the Peace Commission at Paris requested the immediate restoration of the *status quo* at the time of the signing of the protocol. To this request the American commissioners, who had been specifically instructed that the city and suburbs of Manila were held "by conquest as well as by virtue of the protocol," refused to yield.[2]

Where the treaty fixes a future date for the cessation of hostilities in remote places, it is generally agreed that hostilities must cease upon the receipt of official notice, although the time allowed has not expired.[3] Obviously the notification in order to be binding on the officer must be duly authenticated and attested to by his own government.[4]

II. Interpretation

(a) *International Tribunals*

Article XVI of the convention for the pacific settlement of international disputes, signed at The Hague,

[1] *For. Rel. 1898*, pp. 813, 814, 830.

[2] *Sen. Doc. 148*, p. 6, 56th Cong. 2nd sess; *Sen. Doc. 62*, pp. 13, 15, 21, 55th Cong. 3rd sess.

[3] Wheaton, sec. 548; Halleck, vol. i, p. 319.

[4] See Case of the Swineherd. Hall, p. 582.

July 29, 1899, and to which the principal powers of the world, with the exception of the Central and South American states, are signatory parties, reads: "In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle." In Article X of the original Russian project, arbitration was to be made obligatory in cases of disagreement in the interpretation or application of treaties and conventions concerning postal and telegraphic service, international railways, protection of submarine telegraphic cables, rules for preventing collisions on the high seas, protection of literary, artistic and industrial property, monetary affairs, weights and measures, sanitary affairs, veterinary precautions, measures against the phylloxera, inheritances, extradition, mutual judicial assistance, navigation of international rivers and interoceanic canals, and boundary conventions so far as they concerned purely technical and not political questions.[1] Obligatory arbitration in any dispute that might arise out of treaties relative to monetary affairs and the navigation of international rivers and interoceanic canals, was, not without reason, objected to in the *Comité d'Examen*, by the American member (Mr. Holls), and on the motion of the German member (Dr. Zorn), who opposed the general principle of obligatory arbitration, the article was stricken out in the committee.[2] In the plan of a tribunal of arbitration adopted in April, 1890, by the First International Conference of American States, but which

[1] *Conférence internationale de la Paix*, pt. 4, p. 202.

[2] Holls, *Peace Conference at The Hague*, p. 227.

failed to receive the necessary ratification, arbitration in controversies with regard to the validity, construction and enforcement of treaties, was made obligatory. The Second Conference which met at Mexico in 1901–2, by the protocol adopted January 15 (nineteen republics represented), recognized "as a part of public international American law the principles set forth" in the three conventions, relative to the rules of war, signed at The Hague, July 29, 1899; and authorized the governments of the United States and Mexico to negotiate with the other powers signatory to the convention for the pacific settlement of international disputes, for the adherence thereto of the American nations so requesting.[1]

In Article XXIII of the postal-union convention signed at Vienna July 4, 1891, which article is renewed in the convention signed at Washington June 15, 1897, it is provided that disagreements between two or more parties to the union, as to the interpretation of the convention, shall be decided by arbitration in a manner prescribed in the article.[2] A resolution introduced in the Chamber of Deputies of the Italian Parliament in November, 1875, and unanimously agreed to, requested the government to insert in all future treaties where possible a clause providing that difficulties arising in their execution or interpretation should be referred to arbitration. Since that date a large proportion of the treaties entered into by Italy have contained such a provision.[3] A resolution of the Institute of International Law at Zurich in 1877 contained a recommendation of similar pur-

[1] *Sen. Doc. 330*, pp. 11, 36, 40, 57th Cong. 1st sess.

[2] 28 *Stat. at L.*, 1093. 30 *Stat. at L.*, 1645.

[3] See for list, Report of M. le Chevalier Descamps to the Hague Conference, Annex E.

port.[1] Norway, not being allowed separate diplomatic representation, has been solicitous in this respect, and in the three commercial treaties applying to her separately, concluded March 22, 1894, with Switzerland, June 11, 1895, with Belgium, and December 31, 1895, with Portugal, such provisions were inserted.[2] In the unratified treaty between the United States and Denmark of January 24, 1902, for the cession of the Danish West Indies, it was provided that differences arising in its execution or interpretation should be submitted to the Permanent Court of Arbitration at The Hague.[3] Likewise treaties of arbitration have been concluded providing for general compulsory arbitration in this respect. Such a treaty was signed January 11, 1902, between Spain and Mexico.[4] In the treaties of arbitration concluded by Great Britain October 14, 1903, with France, February 1, 1904, with Italy, and February 27, 1904, with Spain, it is agreed that differences that may arise out of the interpretation of treaties between the two contracting parties which can not be settled by diplomacy shall be referred to the Permanent Court of Arbitration at The Hague, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

Although no branch of international relations could be more safely entrusted, without compromising the sovereignty of the state, to an international court of appeal,

[1] A similar recommendation was made by the Interparliamentary Union for international arbitration that met at Vienna in 1903.

[2] Arts. VII, XX, XVI. *Brit. and For. State Papers*, vol. lxxxvi, p. 1026; vol. lxxxvii, pp. 537, 840.

[3] Art. VI.

[4] *For. Rel. of the U. S. 1902*, p. 813.

than the interpretation of treaties, which constitute the the positive law between nations, there does not exist at present any standing tribunal before which the parties to a disputed interpretation must lay, except by special agreement, their contentions for adjudication.

(b) *Judicial and Political Questions*

Where the treaty operates infraterritorially, as in the United States, or becomes by enactment a part of the municipal law, doubts respecting its meaning in cases between individuals are questions for the courts. The external relations of the treaty between government and government are primarily political questions.[1] Likewise in those states where the act to carry into effect, and not the treaty itself, comes before the court the interpretation is by the political branch, and the law in question may be considered as expressing the interpretation placed upon the treaty by the legislature. With respect to political questions, although they may affect individual rights, the courts of the United States have expressed a willingness to follow the decision of the political departments, the President and Congress. In reply to arguments made before the Supreme Court in 1853, that the King of Spain had not power according to the Spanish constitution to annul by the treaty of 1819 grants made in Florida, Chief Justice Taney, speaking for the Court, said, "But these are political questions, and not judicial. They belong exclusively to the political department of the government * * * it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the

[1] See Hamilton's *Works* (Lodge ed.), vol. iv, p. 139; Foster *vs.* Neilson, 2 Pet., 253.

Constitution has imposed on it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered."[1] So also the Court has recognized as political the question whether power remains in a foreign state to carry out its treaty obligations, and has refused to interfere with the decision of the political department in this regard. The fact that extradition had been mutually requested and granted since the formation of the German Empire in 1871 under the treaty originally concluded with Prussia June 16, 1852—its subsequent existence thus having been recognized by the executive branch—was regarded by the Supreme Court "as of controlling importance" in deciding that the treaty was still in force.[2] If the legislature has expressed itself clearly as to the boundaries of the nation as defined by treaty, the courts will accept its construction without going into the merits.[3] A construction of a treaty stipulation defining the jurisdictional limits of the United States which has been insisted upon by the Executive will be accepted by the courts, the construction placed upon it by Congress, while not definite, being conformable thereto.[4] The consideration in the first instance of questions of a judicial character, which may later come before the courts, naturally devolves at times upon the department of government entrusted with foreign relations.

Under the Articles of Confederation the Secretary for

[1] Doe *vs.* Braden, 16 How., 657.

[2] Terlinden *vs.* Ames, 184 U. S., 285, 288.

[3] Foster *vs.* Neilson, 2 Pet., 253, 309.

[4] *In re* Cooper, 143 U. S., 472.

Foreign Affairs found it advisable to submit questions arising in the interpretation of treaties to the Congress.[1] Under the Constitution the Senate, although a co-ordinate branch of the treaty-making power, is not usually consulted by the President in matters of interpretation. Nevertheless, on representations by the French government that acts of Congress which imposed extra tonnage dues on foreign vessels, and did not except therefrom French vessels, contravened the fifth article of the treaty of 1778, President Washington, before making answer, submitted the question to the Senate for its consideration. The Senate advised as to the meaning of the article in a resolution adopted February 26, 1791.[2] The Executive likewise submitted to the Senate the political question which arose in 1868 between this government and the Ottoman Porte on the construction of Article IV of the treaty of May 7, 1830.[3] Decisions of international commissions have been submitted by the President to the Senate for its opinion whether the commissioners had acted within their powers, *i. e.*, interpreted correctly the convention under which they were appointed. The decision of the commission under the claims convention with Paraguay, signed February 4, 1859, was communicated by President Buchanan February 12, 1861, to the Senate for this purpose.[4] In the case of the award of the King of the Netherlands as arbitrator under the convention of September 29, 1827, which was submitted by President Jackson, the Senate advised that the award was not obligatory.[5]

[1] *Dip. Cor. 1783-9*, vol. i, p. 245. [2] *Ex. Journal*, vol. i, p. 77.

[3] *Treaties and Conventions*, p. 1371. [4] *Ex. Journal*, vol. xi, p. 268.

[5] As to the nature of the award, see Moore, *International Arbitrations*, vol. i, p. 138.

(c) *General Intent*

As the agency through which the state contracts the obligation often consists of distinct branches acting separately, it is peculiarly necessary that the express provisions of the treaty should be considered as conveying accurately the intention of the parties. The intention as there expressed is, however, to be found by a consideration of the whole instrument, not by viewing the stipulations separately. From this it follows that a literal interpretation of a clause may not be made to defeat the main purpose of the parties as gathered from the entire treaty.

Article I of the treaty of June 15, 1846, between the United States and Great Britain for the establishment of a boundary between their territories west of the Rocky Mountains, provided for the continuation of the 49th parallel westward to the middle of the channel which separates the continent from Vancouver's Island, and "thence southerly through the middle of the said channel, and of Fuca's Straits to the Pacific Ocean." As a matter of fact there proved to be two principal navigable straits—the Canal de Haro and Rosario Strait—leading from the middle of the channel through the archipelago to the Strait of Juan de Fuca. In favor of the British contention for the Rosario Strait, the one nearer the continent, was the fact that a line through the Canal de Haro must proceed for some distance in a westerly direction, instead of southerly, as provided in the treaty. In favor of the American contention was the general purpose of the treaty, which, as indicated by the treaty itself, had without doubt been to adopt the 49th parallel as the line for the division of the disputed territory, and to allow a deflection from that line only in order to avoid dividing

Vancouver's Island. This view had been expressed in the Senate at the time of the ratification of the treaty. William I, German Emperor, acting as arbitrator under Article XXXIV of the treaty of May 8, 1871, after seeking the advice of eminent German jurists, rendered a decision favorable to the United States.[1] As a further illustration of the principle, the familiar case of the destruction of the fortifications at Dunkirk may be noted. By the ninth article of the peace of Utrecht between France and Great Britain, it was agreed that the fortifications at Dunkirk should be destroyed. While destroying those at Dunkirk, the King of France proceeded to erect new ones at Mardyck, a short distance away. The evident intention of the stipulation on the part of the British government was to prevent the existence of a French fort on the English Channel, not the mere destruction of the particular fortifications then standing. The British government objected to the narrow construction, and ultimately the work was discontinued.[2]

In the case of an ambiguous clause, opinions of the negotiators, who were presumably acquainted with its origin, expressed at the time of the conclusion of the treaty, naturally have much influence in determining the intention of the parties. An interesting use of negotiators' testimony may be found in the proceedings of the mixed commission under Article V of the treaty of

[1] Moore, *International Arbitrations*, vol. i, pp. 214, 219, 220, 224, 229. Similar arguments were advanced by the American commissioners in the arbitration of the northeastern boundary dispute before the King of Netherlands in construing the terms "Highlands," "Atlantic Ocean," and "St. Lawrence," as used in Art. II of the treaty of peace of 1783. *Ibid.*, pp. 107, 114.

[2] Phillimore, vol. ii, p. 97.

November 19, 1794, with Great Britain to determine the St. Croix River and its source under Article II of the treaty of peace. The boundaries of the United States as therein defined began with "that angle which is formed by a line drawn due north from the source of Saint Croix River to the Highlands." There proved to be no river in that region then known by that name. Under these circumstances President Adams and John Jay, the surviving American negotiators, made depositions, which were duly admitted in evidence, as to the map used by the negotiators. Likewise a letter written by Franklin was introduced as evidence.[1] Extrinsic evidence of intention cannot, however, be accepted in contradiction of a literal and natural interpretation. Before proceeding to the exchange of ratifications of the treaty of April 19, 1850, between the United States and Great Britain, but subsequently to the action of the United States Senate thereon, memoranda were filed by the negotiators declaring that the language of Article I, which provided that neither party would ever "occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America," was not understood by the states contracting or by themselves, to include the British settlement at Honduras and the small islands adjacent thereto. Although the declaration of the American negotiator was given with the approval of the chairman of the Senate Committee on Foreign Relations, who professed to speak as to the understanding of the Senate —an assumption denied and much criticised later by different members[2]—it formed no part of the treaty, not

[1] Moore, *International Arbitrations*, vol. i, p. 18 *et seq.*

[2] *Brit. and For. State Papers*, vol. xlii, p. 200. *Compilation of Reports of Sen. Com. on For. Rel.*, vol. viii, pp. 47–61.

having been mutually agreed to by the full treaty-making powers of the two states. The purpose of the treaty had been to do away with British pretensions in Central America, not to confirm them, and any exception to this general purpose and to the wording of the treaty should have been expressly stated. Whether or no Belize was excepted from the operation of the treaty, depended entirely upon the geographical fact of its location without or within the boundaries of Central America as then known. But, if this fact was not clearly ascertainable, the memoranda, as expressions of those intimately connected with the formation of the article, could not be overlooked.[1]

(d) *The Language*

If the treaty is drawn up in the language of each of the contracting parties, and each is an original,[2] the two versions are to be construed collectively. In case they cannot be made to harmonize, the version of the party granting is to be accepted so far as regards the concession. Article VIII of the treaty of February 22, 1819, by which Spain ceded Florida to the United States, differed in the two versions in respect to the grants made by the King of Spain prior to January 24, 1818. In the Span-

[1] Mr. Marcy, Secretary of State, in a communication to Mr. Borland, United States minister to Central America, Dec. 30, 1853, said: "It is believed that Great Britain has a qualified right over a tract of country called the Belize, from which she is not ousted by this treaty, because no part of that tract, when restricted to its proper limits, is within the boundaries of Central America." *Sen. Doc.*, 194, p. 99, 47th Cong., 1st sess. See in this relation *For. Rel.*, *1899*, p. 747; the case of the Diamond Rings, 183 U. S., 180.

[2] An express provision is sometimes inserted in the treaty declaring which text, in case of conflict, shall be the standard. See Art. XVII of the treaty of Oct. 8, 1903, between the United States and China.

ish text it was stipulated that all these grants "shall remain ratified and confirmed,"[1] while the English original read "shall be ratified and confirmed." In a construction of the clause by the Supreme Court in 1832, Mr. Justice Baldwin, in delivering the decision of the Court, said, "The King of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted and the thing reserved and excepted in and by the grant. The Spanish version was in his words and expressed his intention, and though the American version showed the intention of this government to be different, we cannot adopt it as the rule by which to decide what was granted, what excepted and what reserved."

A protracted controversy between the government of the United States and the Ottoman Porte has resulted from a conflict between the English and Turkish texts of Article IV of the treaty of May 7, 1830. The draft of the treaty presented by the American commissioner, in strict conformity with which the Turkish text was said to have been drawn up and signed, was, it appears, in the French language. The Senate and President in the ratification did not, however, act upon this text but upon an English translation, made in the Department of State.[3] On the return of the instrument to Constantinople for exchange, the Ottoman government objected that there had been returned "the translation made in Washington, instead of the one signed at Constantinople." To re-

[1] *Quedarán ratificadas y reconocidas.*

[2] United States *vs.* Arredondo, 6 Pet., 741.

[3] There are three English versions in the Department of State, each of which differs slightly from the other. *Treaties and Conventions*, p. 1371.

move this objection the American chargé d'affaires, who was empowered to exchange the ratifications and make explanations respecting the rejection by the Senate of a separate article to the treaty, signed a memorandum in which the Turkish text was virtually recognized as the original—an act not disapproved by his government. Moreover, the President in communicating the treaty to the Senate, and later in proclaiming it, alluded to the original in the Turkish language, which was said to be accompanied by an English translation that was believed to be correct. Likewise in favor of the Turkish text is the fact that the article finds application alone within the dominion of the Ottoman Porte. In support of the English version it is contended that it remained unchallenged for a period of more than thirty-five years; and that similar language was repeated in treaties concluded subsequently by the Porte with Belgium and Portugal. Admitting the authority of the Turkish text and the correctness of the translation presented by the Ottoman government—that American citizens "shall be punished through the agency of their ministers and consuls, according to the practice observed in regard to other Franks," and not, as the English text would have it, that they shall be "tried" and "punished"—yet, it is urged on the part of the government of the United States, that the right to try is incident to and involved in the right to punish, and that, moreover, the rights in question belong to the United States in virtue of the most-favored-nation clause of the treaty.[1]

If terms used in a treaty have a different legal meaning in the contracting states, that meaning which obtains within the state to which the provision applies at the

[1] *For. Rel., 1900*, p. 914.

time of the signing of the treaty is to be accepted. By Article XIV of the treaty of October 3, 1866, between Austria and Italy, it was stipulated that the inhabitants of the territory ceded by the former should, for a specified time, enjoy the privilege of withdrawing with their property. In Austria the term inhabitant was applicable to only such persons as were domiciled according to Austrian law, while in Italy it applied to any one who lived in a commune and was registered as a resident. The term was accordingly interpreted in conformity with the Austrian legal meaning, which was on the date of the treaty applicable to the territory.[1]

While it is usually stated that technical words are to be interpreted according to their ordinary technical meaning,[2] the degree of civilization to which each of the contracting parties has attained must be taken into consideration. A treaty with an Indian tribe must be interpreted not according to the technical meaning of its words as understood by learned lawyers, but in the sense in which it is naturally understood by the Indians.[3] Words should be interpreted with a view to give efficacy to the treaty.

A treaty repeals all previous stipulations between the same parties inconsistent therewith, but treaties with a third party are unaffected by a subsequent treaty to which it has not given its assent. No priority is attached to the numerical order of the provisions in the same treaty. In a conflict between provisions of the same treaty a special provision takes precedence of a general; a prohibitory or imperative of a permissive. If the provisions are of identical nature the more important takes prece-

[1] Hall, p. 353. Rivier, vol. ii, p. 125.

[2] Phillimore, vol. ii, p. 101. Vattel, bk. ii, ch. xvii, sec. 276.

[3] Jones *vs.* Meehan, 175 U. S., 1.

dence. In prohibitory stipulations to which penalties are attached for non-observance, the one to which the greater penalty is attached is to be considered the more important, but the party in whose favor the provision operates has the liberty to choose the less important.[1]

III. The Termination

(a) *Change in the Form of Government*

An international treaty is a compact between states, not organs of governments, consequently its obligation is not, in general, dependent upon the continuance of the particular form of government under which it happened to be contracted. Treaties, the purpose of which is peculiar to the existing form,[2] as also agreements between heads of governments, of a personal nature, which are not *sensu stricto* international treaties,[3] are to be excepted. Thus the Family Compact of August 15, 1761, between the kings of France and Spain, the aim of which was to render permanent the duties which were a "natural consequent of relationship and friendship," came to an end when the Bourbons ceased to reign in France.[4] Of this character was also the alliance entered into September 26, 1815, by the Czar Alexander of Russia, the Emperor Francis of Austria, and King Frederick William III of Prussia.

An interesting discussion of this general question

[1] Vattel, bk. ii, ch. xvii, secs. 312–321. Hall, pp. 356–7.

[2] Grotius, bk. ii, ch. xvi, sec. 16. [3] Hall, p. 376.

[4] In August, 1790, Spain having requested France to make common cause in the Nookta Sound controversy with Great Britain, the Nationa Assembly declared the compact not binding on the nation. In Art. II possessions in any part of the world had been mutually guaranteed. Rivier, vol. ii, pp. 36, 121.

occurred in Washington's cabinet in April, 1793, on the proposition to receive the minister from the republic of France with an express reservation of the question whether the treaties of 1778 ought not to be temporarily and provisionally suspended. In support of such a reservation it was urged by the Secretary of the Treasury that, if a nation thought fit to make changes in its government which rendered treaties theretofore existing between it and another nation useless, or dangerous, or hurtful to that other nation, the latter would, according to the plain dictate of reason, have a right to renounce those treaties; that a contracting state had a right to take care of its own happiness and could not be obliged to suffer this to be impaired by the means which its ally had adopted for its own advantage contrary to the ancient state of things; but that the treaties continued absolutely binding on the party making the change and would bind the other, unless in due time it declared its election to renounce them, which in good faith it ought to do only if the change had rendered them "useless or materially less advantageous, or more dangerous than before." An alliance might be formed because each had confided in the energy and efficacy of the government of the other, while the newly-formed government might be feeble, fluctuating, and liable to provoke wars. As to the French treaties, since everything was *in transitu*, it was his opinion that the United States had an option to consider the operation of these treaties as suspended, and would eventually have a right to renounce them, if such changes should take place as could "*bona fide* be pronounced to render a continuance of the connections which result from them disadvantageous or dangerous."[1] The fundamental principle of the elaborate

[1] *Works of Hamilton* (Lodge ed.), vol. iv, p. 74.

opinion of the Secretary of State, with whom concurred the Attorney-General, was, to use his now classic words, that "all the acts done" by the proper agents "under the authority of the nation, are the acts of the nation, are obligatory on them, and enure to their use, and can in no wise be annulled or affected by any change in the form of the government or of the persons administering it. Consequently the treaties between the United States and France were not treaties between the United States and Louis Capet, but between the two nations of America and France, and the nations remaining in existence, though both of them have since changed their forms of government, the treaties are not annulled by these changes." He however admitted that conditions might arise that would release the nation from the treaty obligations. "When performance, for instance, becomes *impossible*, non-performance is not immoral. So if performance becomes *self-destructive* to the party, the law of self-preservation overrules the laws of obligation to others," but the danger which absolves "must be great, inevitable and imminent." As to the French treaties, "no part of them," he declared, "but the clause of guarantee holds up *danger* even at a distance."[1] It may be added that the minister from the republic was received without reservation and our policy early established of recognizing without prejudice the *de facto* government.[2]

(b) *Change of State Identity.*

When a state loses entirely its identity by incorporation into another, its obligation to execute pre-existing

[1] *Writings of Jefferson* (Ford ed.), vol. vi, p. 219.

[2] Upon the general proposition of release from treaty obligations by the changed relation of the parties, see Vattel, bk. ii, ch. xvii, sec. 296; Grotius, bk. ii, ch. xvi, sec. 25; Phillimore, vol. ii, p. 109.

treaties ceases. This results from the impossibility of performance. "It is," says Hall, "an implied condition of the continuing obligation of a treaty that the parties to it shall keep their freedom of will with respect to its subject-matter, except in so far as the treaty is itself a restraint upon liberty, and the condition is one which holds good even when such freedom of will is voluntarily given up."[1] The principle that a treaty between two parties is not annulled by an inconsistent subsequent treaty between one of these and a third party does not have full application in such cases, for, says the same eminent author, "it cannot be supposed that a state will subordinate its will to that of another state, or to a common will of which its own is only a factor, except under the pressure of necessity or of vital needs."[2] All treaties between the United States and Hanover and Nassau have been considered as having been terminated with the conquest and incorporation in 1866 of those two states into Prussia.[3] The Italian government considered the treaties between foreign countries and the two Sicilies terminated, at least for most purposes, on the consolidation of the latter with the kingdom of Sardinia in 1860, but treaties existing with Sardinia, the nucleus of the kingdom, it regarded as still binding and applicable to the whole kingdom.[4] Soon after the consolidation new treaties were concluded with several of the European powers, and it may be noted that in the treaty with Great Britain of August 6, 1863, it was specifically provided that the treaties "in force," among which those with the Two Sicilies were enumerated, were to be su-

[1] *International Law* (4th ed.), p. 373. [2] *Ibid.*, p. 374.

[3] *For. Rel., 1875*, p. 479.

[4] *Dip. Cor., 1864*, pt. 4, p. 334. See, however, p. 328.

perseded by the new treaty.[1] With the occupation of Madagascar by the French in 1895, a question was raised by the United States as to the status of the treaty of May 13, 1881, with that island. The French government in reply, April 16, 1896, observed that the maintenance of the treaty was "inconsistent with the new order of things created by the taking possession," but at the same time declared its intention to extend to the island the conventions applicable to the government and citizens of the United States in France or French possessions. Upon the passage of the law of annexation the French government declared the treaties formerly existing with Madagascar abrogated, and the system of conventions in force in French colonies to be substituted.[2] In the joint resolution of July 7, 1898, by which the Hawaiian Islands were annexed to the United States, it was specifically declared that all treaties then existing between the Islands and foreign powers should forthwith cease, being replaced by treaties between the United States and such foreign nations.[3]

A question arose between the United States and the Netherlands relative to the treaty of 1782. In the course of the French wars, the United Netherlands were, after various changes both in territory and in form of government, finally incorporated into the French Empire and entirely disappeared as a separate nation. In the reconstruction at the Congress of Vienna, the Belgic and certain other provinces were joined to the United Netherlands and the whole designated as the kingdom of the Nether-

[1] Art. XX. *Brit. and For. State Papers*, vol. liii, p. 45.

[2] *For. Rel., 1896*, pp. 123, 125.

[3] 30 *Stat. at L.*, 750. As to the effect of annexation on private debts, see 22 *Op. Att.-Gen.*, 584; Hall, p. 104; Rivier, vol. i, pp. 70, 213.

lands. The state as thus formed, although in general considered the successor, differed in name, territory and form of government from the state that had entered into the treaty with the United States. In the correspondence that immediately followed the reconstruction, the government of the Netherlands took the position that the treaty was no longer in force, and this was not at the time contested. Later, in 1818 and 1819, in urging spoliation claims, the government of the United States, however, contended for the existence of the treaty, but the contention was not pressed. On subsequent occasions both countries have considered the treaty as having been terminated.[1]

When one state unites or confederates with another but still retains to a limited degree its separate character, the continued validity of treaties is less easily determined. If the confederated state retains liberty of action with respect to the matter touched upon by the treaty, its obligation will still exist. A treaty of extradition was entered into June 16, 1852, by the United States and Prussia, which, by Article III of the naturalization treaty of February 22, 1868, was extended to the North German Confederation. In 1871, Prussia as well as the other states of the Confederation became merged in the German Empire. The several states of the Empire retain the power of regulating, by agreement with foreign powers or by laws enacted for their own territories, the subject of extradition so far as not hindered by imperial law or treaties. The King of Prussia, the former chief executive of the North German Confederation, also still retains as Emperor the power to carry into effect international obligations in this respect. Under these conditions the treaty

[1] *For. Rel., 1873*, p. 720.

has been recognized by the United States as a subsisting compact.[1] In a note addressed to Texas, just prior to its definitive incorporation into the United States as a State of the Union, it was contended by the government of Great Britain that the voluntary surrender of independence could not annul existing treaties.[2] The position of the United States in this case, which involved treaties of commerce, was, as expressed by Mr. Fish, Secretary of State, September 18, 1876, that the union between the United States and Texas, being effected by the legislation of the parties, necessarily cancelled treaties between the latter and foreign powers, "so far at least as those treaties were inconsistent with the Constitution of this country, which requires customs duties to be uniform *throughout the United States.*"[3] On June 20, 1895, the states of Honduras, Nicaragua and Salvador entered into a treaty, by which they were to form a single political entity, called the Greater Republic of Central America, as regards intercourse with foreign nations, but were to retain their autonomy and independence as regards their internal affairs. In receiving, December 24, 1896, a minister from this union, the President of the United States expressly stated that the recognition was accorded with the understanding that the responsibility of each of the republics to the United States should remain wholly unaffected.[4]

A state formed by separation from another, whether the identity of the original state still exists or is completely lost by disintegration, succeeds to such treaty

[1] Terlinden *vs.* Ames (1901), 184 U. S., 276.

[2] *Sen. Doc.*, 375, pp. 3, 5, 29th Cong., 1st sess.

[3] Wharton's *International Law Digest*, vol. i, p. 24.

[4] *For. Rel.*, *1896*, pp. 370, 390.

obligations as are peculiarly local. Of this character was the boundary agreement of January 12, 1828, between the United States and Mexico, which "having been entered into at a time when Texas formed a part of the United Mexican States" was recognized by Texas after its separation as a binding compact.[1] Stipulations with respect to water-courses and the navigation of rivers are here included. Likewise the provisions of Article XXXV of the treaty of 1846 between the United States and New Granada, in which the right of way or transit across the Isthmus of Panama upon any modes of communication then existing, or which might thereafter be constructed, was guaranteed to the government and citizens of the United States, together with the correlative obligations on the part of the United States, have been considered as forming a covenant "that runs with the land, to the duties and benefits of which the new state of Panama succeeded." The doctrine of the liability of the seceding portion to treaty obligations of the parent state has, in some instances, been asserted in latitude sufficient to include those of a purely national character. For instance, the government of the United States, soon after recognizing Texas, gave notice that it considered the treaty of amity, commerce and navigation between the United States and Mexico of April 5, 1831, as mutually binding upon the United States and Texas. The obligation was subsequently recognized by Texas.[2] In the Berlin Congress of 1878, when this question was under consideration with reference to Servia and Bulgaria, Bismarck declared that he regarded it as a principle of the law of nations, which could only be corrob-

[1] *Treaties and Conventions*, p. 1079.

[2] *House Doc.*, 12, 27th Cong., 2nd sess.

orated by a declaration of the congress, that a province might not by a separation from a state enfranchise itself from the treaties to which it had up to that time been subjected.[1] It was expressly stipulated in the general treaty signed at the close of the congress, with respect to Servia—which was constituted an independent state—that the conditions of commercial intercourse with foreign countries, the immunities and privileges of foreign subjects, as well as the rights of consular jurisdiction and protection, should remain in full force until replaced by new agreements.[2] With respect to Bulgaria, which was constituted an autonomous principality, but nominally under the suzerainty of the Sultan, it was provided that all treaties existing between the Porte and foreign powers should be maintained.[3]

(c) *War*

Prior to the French Revolution, it was the practice in Europe to renew with each general and important treaty of peace the treaties pre-existing between the belligerents, of an executed as well as of an executory character, concluded since the Peace of Westphalia.[4] In the con-

[1] *Brit. and For. State Papers*, vol. lxix, pp. 934, 961.

[2] Art. XXXVII. Hertslet's *Map of Europe by Treaty*, vol. iv, p. 2787.

[3] Art. VIII.

[4] By Art. II of the treaty of peace signed at Paris February 10, 1763, "The treaties of Westphalia of 1648; those of Madrid, between the crowns of Great Britain and Spain, of 1667 and 1670; the treaties of peace of Nimeguen of 1678 and 1679; of Ryswyck of 1697; those of peace and of commerce of Utrecht of 1713; that of Baden of 1714; the treaty of the triple alliance of The Hague of 1717; that of the quadruple alliance of London of 1718; the treaty of peace of Vienna of 1738; the definitive treaty of Aix-la-Chapelle of 1748; and that of Madrid, between the crowns of Great Britain and Spain of 1750; as well as the treaties between the crowns of Spain and Portugal of the 13th of February, 1668;

troversy between the United States and Great Britain that immediately followed the war of 1812, as to the effect of the war on the "liberties" of American fishermen as defined in the treaty of 1783, of which liberties the treaty of Ghent made no mention, it was contended by John Quincy Adams, minister of the United States at London, that the former treaty was "not in its general provisions, one of those, which, by common understanding and usages of civilized nations," could be considered as annulled by a subsequent war between the parties. The treaty was considered by Adams, as it had also been by the Americans who negotiated it, as one of partition, in which nothing was received as a grant. Lord Bathurst, on October 30, 1815, replied: "To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same parties." His lordship doubtless used the term treaty in the restricted sense of executory contracts, designated by earlier writers "treaties properly so-called," for he admitted that the treaty contained irrevocable provisions, and that it was by no means unusual for treaties to contain recognitions and acknowledgements of title in the nature of perpetual obligations; and he further added that the "right" to take fish as recognized in Article III of the treaty was of this permanent character, but that the "liberty" to take fish as therein provided was a con-

of the 6th of February, 1715; and the 12th of February, 1761; and that of the 11th of April, 1713, between France and Portugal, with the guaranties of Great Britain; * * * as well as all the treaties in general which subsisted between the high contracting parties before the war" were renewed and confirmed in all points not inconsistent with the new treaty as if inserted word for word. Chalmers's *Collection of Treaties*, vol. i, p. 470.

cession "strictly dependent on the treaty itself."[1] Shortly after this correspondence the Supreme Court was called upon to decide as to the effect of the war of 1812 upon rights vested under Articles VI and IX of the treaties of 1783 and 1794 with Great Britain. In handing down the decision of the Court—that such rights were not divested—Mr. Justice Washington said: "But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto* by war between two governments . . . Treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are at most only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."[2] So also Article IX of the treaty of 1794, which removed reciprocally the disabilities of American citizens holding lands in Great Britain, was held by an English court, in 1830, to be permanent in its operation as to rights vested on the date of the exchange of ratification of the treaty. Sir John Leach, Master of Rolls, in pronouncing the decision said, "The privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent and not depend upon the continuance of a state of peace."[3]

[1] *Am. State Papers For. Rel.*, vol. iv, pp. 352, 354.

[2] 8 Wheat., 494.

[3] Sutton *vs.* Sutton, 1 Russell & Mylne, 663. Twiss, *Rights and Duties in Time of Peace*, p. 420.

That acts previously done or rights previously vested under the sanction of a treaty are not affected even by its termination will hardly be contested. Accordingly executed treaties, or treaties designated by some writers as "transitory conventions," which are intended to set up a permanent state of things by an act done once for all, are unaffected by war. Treaties ceding territory or establishing boundaries are of this nature. Treaties recognizing permanent obligations or aiming at perpetuity are at most only suspended during war. Such an obligation is found in the convention between the United States and Spain signed February 17, 1834, which provides for the settlement of claims of American citizens for seizures and confiscations of vessels during the war between Spain and her American colonies. It is a recognition, not an assumption, of an obligation on the part of Spain. By Article I, Spain agrees to pay the United States as indemnity "the sum of twelve millions of rials vellon, in one or several inscriptions, as preferred by the government of the United States, of perpetual rents, on the great book of the consolidated debt of Spain, bearing an interest of five per cent. per annum." In conformity with the convention there has been paid to the United States each year in full discharge of the annual interest on the "perpetual rents" $28,500.[1] In the treaty of peace between the two countries signed December 10, 1898, the convention is not referred to, nor was any provision made for its renewal. The annual payment had been suspended in 1898, as the result of hostile relations. When on the restoration of peace the matter was first brought to its attention, the Spanish government, observing that the debt arose "out

[1] Moore, *Columbia Law Review*, vol. i, p. 213.

of a treaty which was suspended in virtue of the late war," considered it necessary to defer action on it until the important point of the "renovation of the agreements celebrated between the two countries" had been decided.[1] As the obligation to pay the debt was made perpetual by the provisions of the treaty, the government of the United States was unable to perceive the connection between its payment and the making between the two governments of commercial, consular and extradition treaties.[2] Subsequently, the Spanish government admitted a distinction in this respect by making in December, 1899, independently of the question of the renewal of the other treaties, full payment not only for the year 1899, but also for the year 1898, thereby recognizing the perpetuity of the obligation.

Treaties dealing with the rights of the subjects of the one country in the territory of the other and implying no intercourse between the states, if intended to produce a permanent state of things, such, for instance, as a naturalization treaty, may, it seems, be considered as continuing on the restoration of peace.[3] Treaties between three parties are unaffected as regards the relations of each with the third party by a war between two of them. Accordingly a war between two states cannot terminate their duties under general conventions intended to establish permanent dynastic and political relations. Of this character are the treaties of Paris of 1856, and Berlin of 1878.

As to treaties entered into with a view to future hos-

[1] *For. Rel., 1899*, p. 709. [2] *Ibid.*, p. 710.

[3] Hall, who holds to the theory of individual enmity, considers that such a treaty revives, but that it is voidable at the will of either party. *International Law* (4th ed.), p. 404.

tile relations, Vattel says, in connection with the general proposition that war annuls treaties, "Yet here we must except those treaties by which certain things are stipulated in case of a rupture—as, for instance, the length of time to be allowed on each side for the subjects of the other nation to quit the country—the neutrality of a town or province insured by mutual consent, etc. Since, by treaties of this nature, we mean to provide for what shall be observed in case of a rupture, we renounce the right of cancelling them by a declaration of war."[1] Nations from an early day have entered into such treaty stipulations; and it may well be asked what is their value, unless they are binding on the happening of the contingency for which they were designed. In a decree of the Spanish government of April 23, 1898, on the outbreak of hostilities with the United States, it was declared that the state of war terminated all agreements, compacts and conventions that had been in force up to that time between the two countries.[2] In Article XIII of the treaty of 1795, which treaty was specifically mentioned in the decree, it was stipulated that in case of war one year after its proclamation should be allowed to the merchants in the cities and towns where they resided for collecting and transporting their goods and merchandise. Although the attention of the Spanish government was called to this article, it expressed an unwillingness to make any exception to the decree already issued, but offered to enter into a special agreement for the provisional application of the stipulation in question. The United States declined the proposal on the ground that the provision being expressly applicable to war between the contracting parties was not abrogated by it.[3] It is difficult to

[1] Bk. iii, ch. x, sec. 175. [2] *For. Rel.*, *1898*, p. 774. [3] *Ibid.*, p. 972.

perceive any greater obligation on the part of belligerents to observe a special stipulation, entered into after the outbreak of hostilities, than that which results from engagements entered into previously, solely with a view to such an outbreak.

Treaties of alliance are necessarily dissolved by the outbreak of war between the contracting parties. Agreements regulating the commercial and social intercourse between them are suspended during hostilities, if for no other reason, because the hostile relations render the parties incapable of executing them. So also on the ground that a belligerent has a right to deprive his enemy of property during war, he may withhold privileges conferred by the treaty.[1] On the question whether treaties of this character are merely suspended during the war and revive on return of peace, or are definitively terminated, writers on international law are not agreed.[2] The practice of nations tends rather to negative than to support the doctrine of their *ipso facto* revival. The treaty of peace signed February 2, 1848, at the close of the Mexican war, expressly "revived" the treaty of commerce and navigation concluded April 5, 1831, with the exception of the additional article thereto.[3] In the treaty of Paris of March 30, 1856, following the Crimean war, it was expressly stipulated that until the treaties or conventions existing before the war between the belligerent powers had been renewed or replaced by

[1] Vattel, bk. iii, ch. x, sec. 175.

[2] Calvo, vol. iv, sec. 1931; vol. v, sec. 3152. T. A. Walker, *Science of International Law*, p. 327. Lawrence (T. J.), pp. 311, 313. Heffter, secs. 181, 182. Bonfils, sec. 860. Hall, p. 404. Halleck, vol. i, p. 323.

[3] Article XVII. See in this connection Richardson's *Messages*, vol. iv, p. 537.

fresh agreements, trade should be carried on in accordance with the regulations in force before the war; and the subjects of the respective parties should in other matters receive most-favored-nation treatment.[1] The treaty of Zurich signed November 10, 1859, between Austria, France and Sardinia confirmed as between Austria and Sardinia all treaties in force at the outbreak of the war not incompatible with the new treaty.[2] As between Austria and France no such confirmation was stipulated for. In the treaty of peace between Austria, Prussia and Denmark signed at Vienna October 30, 1864, all treaties concluded before the war not abrogated or modified by the treaty were "re-established in their vigour."[3] The treaty of peace between Austria and Prussia signed at Prague August 23, 1866, provided that all the conventions concluded between the contracting parties before the war were thereby again brought into force, so far as by their nature they had not lost their effect by the dissolution of the relations of the Germanic Confederation.[4] In the treaty of Frankfort of May 10, 1871, at the close of the Franco-Prussian war, it was agreed that, the treaties of commerce with the different States of Germany "having been annulled by the war," the governments of the two countries would base their

[1] Art. XXXII. In the conference on March 25, 1856, Count Walewski had observed that the state of war having invalidated the treaties which had existed between Russia and the belligerents, it was proper to insert a provisional stipulation as to the commercial relations of the parties. *Brit. and For. State Papers*, vol. xlvi, pp. 17, 99.

[2] Art. XVII.

[3] Hertslet's *Map of Europe by Treaty*, vol. iii, p. 1631. See for renewal of treaties between Prussia and various German states by special stipulations in treaties of peace, *ibid.*, pp. 1703, 1708, 1713, 1725, 1731, 1774.

[4] Art. XIII.

commercial relations on reciprocal treatment of the most-favored-nation. The article provided further that the conventions of navigation, and those relative to service of international railroads, and for the reciprocal protection of works of art, should be revived.[1] An additional convention signed December 11, 1871, revived, with reservations, treaties existing before the war.[2] In the treaty of San Stefano between Russia and Turkey, signed March 3, 1878, it was provided that all treaties of commerce and navigation, and those relative to the jurisdiction and position of Russian subjects within Turkish dominions, and which had been abrogated by the state of war, should be renewed so far as compatible with the treaty.[3] The treaty of peace between China and Japan signed April 17, 1895, recognized that all treaties between the two had, "in consequence of the war," come to an end. The contracting parties engaged to appoint immediately upon the exchange of ratifications plenipotentiaries to conclude new treaties of commerce and navigation.[4] During the peace negotiations between the United States and Spain at Paris, the American commissioners, acting under their instructions, proposed that all previous treaty stipulations between the two countries that were not already executed or obsolete should "be held to continue in force."[5] The Spanish commissioners rejected the proposal on the ground that the determination of the question what treaties were obsolete would involve a more extended examination than the commission was in a position to give, adding, however, that this did not imply that the two govern-

[1] Art. XI. [2] Art. XVIII. [3] Art. XXIII. [4] Art. VI.

[5] *Sen. Doc.*, 148, p. 7, 56th Cong., 2nd sess. *Sen. Doc.*, 62, pp. 249, 254, 55th Cong., 3rd sess.

ments might not take up the subject themselves. The American commissioners further urged the renewal of the articles on extradition, trade-marks and copyright, and proposed to revive them temporarily by a *modus vivendi*, but this proposition was also rejected. Accordingly no provision was inserted in the peace for the renewal of treaties. A new general treaty of amity and commerce has been concluded, Article XXIX of which declares that all treaties and agreements between the United States and Spain "prior to the treaty of Paris shall be expressly abrogated and annulled" with the exception of the claims convention of February 17, 1834, "which is continued in force by the present convention." On the part of the United States the privilege of the protection of copyright extended to Spanish subjects by the proclamation of July 10, 1895, although suspended during the war, was continued upon the proclamation of the treaty of peace. This fact having been brought to its attention, the Spanish government in a note under date of November 18, 1902, declared that the agreement was on its part re-established and put into renewed operation.

(d) *Infractions*

The difficulty of compelling specific performance, or perhaps of obtaining pecuniary compensation in mitigation of damages, by means other than those which, while they tend to produce hostile relations, do not assure reparation to the innocent party, renders it even more necessary and equitable, than in the case of private contracts, that upon a breach of a treaty the continuance of the obligation should be made dependent upon the will of the party faithfully performing. But what constitutes a breach of this character? In defense of the denuncia-

tion in 1870 of the provisions of the treaty of Paris for the neutralization of the Black Sea, it was contended among other things by the Russian government that the treaty with respect to these provisions had been violated by the repeated entrance of men-of-war into the Straits. An investigation showed that in the course of the fifteen years since its conclusion, men-of-war had been allowed to pass through the Straits not in strict conformity to the treaty as follows: in 1862, one British; in 1866, one American; in 1868, two American, two Austrian, one French and one Russian; and in 1869, one Prussian.[1] It may be doubted that the Russian government would have asserted a right of denunciation on this ground alone.[2] "The admission of a few isolated ships at different times was not an act in itself calculated," says Hall, "to endanger the objects of the treaty, viz., the settlement of Eastern affairs and the rendering of security to Turkey, or to impair the efficacy of the safe-guards given to Russia by way of compensation for the loss of naval power."[3] Prior to the signing of the treaty of London, by which the onerous obligations were for equitable reasons, independently of the questions raised as to the right of denunciation, modified, the plenipotentiaries of Austria-Hungary, Germany, Great Britain, Italy, Russia and Turkey in conference, January 17, 1871, entered into a protocol which declared "that it is an essential principle of the law of nations that no power can free itself from the engagements of a treaty, nor modify the stipulations thereof, except with the assent of the contracting parties by means of an amicable arrangement."[4] The

[1] Hertslet's, *Map of Europe by Treaty*, vol. iii, p. 1895 note.

[2] See *ibid.*, p. 1892 *et seq.* [3] *International Law* (4th ed.), p. 371.

[4] *Brit. and For. State Papers*, vol. lxi, p. 1198.

principle was laid down by Grotius that "every article of the agreement has the force of a consideration,"[1] and by Vattel that the several articles of the same treaty cannot be considered "as so many distinct and independent treaties."[2] Without doubt, every promise made by one party "may go to make up the consideration in return for which essential parts of the agreement are conceded or undertaken,"[3] and it is not for the party committing the infraction to determine what is, or is not, essential in the eyes of the others; yet it is conceivable that the several articles might be so separated and mutually reciprocal that even the aggrieved party could show no relation between the article violated and others embodied in the same general treaty. A standard is to be sought which, in compelling strict observance, will not at the same time encourage the seeking of pretexts for release from onerous treaty obligations. "There can be no question," to quote again from Hall, whose succinct expressions can seldom be improved by recasting, "that the breach of a stipulation which is material to the main object, or if there are several, to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract; but it would be seldom that the infraction of an article which is either disconnected from the main object, or is unimportant, whether originally or by change of circumstances, with respect to it, could in fairness absolve the other party from performance of his share of the rest of the agreement, though if he had suffered any appreciable harm through the breach he would have a right to exact reparation and

[1] Bk. ii, ch. xv, sec. 15.

[2] Bk. ii, ch. xiii, sec. 202; bk. iv, ch. iv, sec. 47.

[3] Hall, p. 368.

an end might be put to the treaty as respects the subject-matter of the broken stipulation."[1]

(e) *By Agreement*

A treaty repeals all pre-existing treaties between the same parties inconsistent with it. As nations may by mutual agreement annul treaties binding on them, so a provision may be, and often is, inserted in the treaty itself, by which the contracting parties agree that it may be terminated by a notice given by the one to the other.

In the United States some doubt has existed as to what body is authorized to give such notice. On the recommendation of President Polk, Congress passed a joint resolution, approved April 27, 1846, authorizing the President, at his discretion, to give notice to the British government of an intention to terminate the treaty of August 6, 1827, relative to the joint occupation of Oregon.[2] Although notice was duly given, the treaty was as a matter of fact superseded, before the expiration of the time required by the treaty as sufficient notice, by a new treaty signed June 15, 1846. Ten years later the question was discussed at some length in the Senate in connection with the proposed termination of the treaty of commerce and navigation of April 26, 1826, with Denmark. President Pierce had, in his annual message to Congress, December 4, 1854, indicated his wish for authority to give the required notice for its termination.[3] The Senate in executive session, March 3, 1855, unanimously passed such a resolution.[4] Acting under its authority, the Executive caused the notice to be given,

[1] Hall, p. 369.

[2] 9 *Stat. at L.*, 109.

[3] Richardson's *Messages*, vol. v, p. 279.

[4] *Ex. Journal*, vol. ix, p. 430.

April 14, 1855, to the government of Denmark.[1] Subsequently the authority of the resolution was questioned by Mr. Sumner in the Senate, avowedly on the ground that it would be equivalent to a repeal of the "supreme laws of the land" by the action of the Senate alone.[2] The Senate Committee on Foreign Relations, to which the matter was referred, made a full report, April 7, 1856, supporting the authority of the resolution.[3] The convention was considered by the Executive as terminated on April 15, 1856, pursuant to the notice, but by Article V of the treaty of April 11, 1857, it was, with the exception of the fifth article, renewed. The following treaties have subsequently been terminated pursuant to notice given by the government of the United States, in each case on the authority of a joint resolution: June 5, 1854, with Great Britain; July 17, 1858, with Belgium; and Articles XVIII–XXV inclusive, and Article XXX of the treaty of May 8, 1871, with Great Britain.[4] It should, however, be noted that in the case of the treaty of 1854 and the articles of the treaty of 1871, treaty provisions were terminated which had been carried into effect by Congressional legislation. So far as the treaty is a mere compact between nations, or so far as it operates *ipso facto* as a law of the land, it would seem that the President should have the power, with the concurrence of two-thirds of the Senate, to give notice of its termination. There is no doubt that he may in the same way replace it with a new treaty.

[1] Richardson's *Messages*, vol. v, p. 334.

[2] *Cong. Globe*, 34th Cong., 1st sess., pp. 599, 601, 1147.

[3] The committee observed, however, that no legislation had been necessary to carry the treaty under consideration into effect. *Compilation of Reports of Sen. Com. on For. Rel.*, vol. viii, p. 108.

[4] 13 *Stat. at L.*, 566; 18 *Stat. at L.*, 287; 22 *Stat. at L.*, 641.

A notice for the termination of the agreement with Great Britain of 1817 relative to vessels of war on the Great Lakes was given, pursuant to the reservation of that right, on November 23, 1864, by the Executive. A resolution with a view to such termination had during the preceding session of Congress passed the House, but had failed of consideration in the Senate. Subsequently to the giving of the notice, a joint resolution was passed by Congress, and approved February 9, 1865, which "adopted and ratified" the notice "as if the same had been authorized by Congress." Notwithstanding this legislative sanction the notice was before the expiration of the required six months withdrawn by the Executive; and the arrangement has subsequently been recognized by both governments as subsisting.[1] The notice given March 23, 1899, to the Swiss government by the Department of State of the intention of this government to terminate Articles VIII–XII of the treaty of November 25, 1850, in accordance with the provisions of the treaty, does not appear to have had any other than Executive authority.[2]

The time specified in the treaty that must elapse between the giving of the notice and the final termination of the treaty, has in the various notices given by the United States been reckoned from the date on which the notice was presented at the foreign office of the other contracting party.[3]

(f) *The Function of Congress*

Madison in a letter to Pendleton, January 2, 1791,

[1] *House Doc.*, 471, pp. 28–34, 56th Cong., 1st sess.

[2] *For. Rel., 1899*, pp. 754–7.

[3] See also *For. Rel., 1865*, pt. i, p. 259; *1874*, p. 65; *1899*, p. 757; *1883*, p. 435.

discussing the operation of treaties in the United States as the supreme law of the land, raised the query whether, in case it should be advisable to take advantage of an adverse breach, Congress, or the President and Senate, were the competent judges.[1] It was Congress that acted in the case of the treaties with France. A resolution approved July 7, 1798, declared that since the treaties had been repeatedly violated on the part of the French government, the United States was freed and exonerated from them, and that thenceforth they should not be regarded as legally obligatory on the government or citizens of the United States.[2] Such an act is to be distinguished from the termination of a treaty by mutual agreement. An abrogation by Congress approved by the President, while necessarily binding on the courts and sufficient to prevent the operation of the treaty as regards this country, will seldom be accepted by the other contracting party as conclusive. Thus in the negotiations at Paris, in 1800, the French government refused to admit that the treaties had been annulled by the single act of abrogation on the part of the United States, and could see no reason to distinguish in the settlement of claims between the period prior to July 7, 1798, and the period subsequent.[3]

In the controversy that arose with Great Britain over the construction of Article X of the treaty of August 9, 1842, providing for the mutual surrender of fugitives from justice, the termination of the article was contemplated. Although Article XI of the treaty made provision for its termination by notice, the immediate ques-

[1] *Letters and other Writings*, vol. i, p. 524. [2] 1 *Stat. at L.*, 578.

[3] Moore, *International Arbitrations*, vol. v, p. 4430. See for final disposition of the treaties, *Treaties and Conventions*, p. 330.

tion was whether the refusal of Great Britain to grant extradition under the article had released the United States from the obligation. Accordingly, President Grant referred the matter to Congress in a special message of June 20, 1876, observing that it was for the wisdom of Congress to determine whether the article was to be any longer regarded as "obligatory on the government of the United States, or as forming part of the supreme law of the land." He added that, should the attitude of the British government remain unchanged, he would not, without an expression of the wish of Congress, take any action either in making or granting requisitions for the surrender of fugitive criminals under the treaty. The operation of the article was, as a matter of fact, suspended for a period of six months, but upon the adjustment of the controversy the article was again regarded by both countries as in full force.[1]

It is well established in our jurisprudence that a law of Congress may terminate the operation of a prior treaty as a law binding on the courts. In the words of Mr. Justice Field, "When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."[2] The operation of the treaty as a municipal law is not, however, to be confused with the obligation of the international compact which cannot be thus terminated by the act of only one of the parties.

[1] Moore, *Extradition*, vol. i, p. 211. Richardson's *Messages*, vol. vii, pp. 373, 414.

[2] Whitney *vs.* Robertson (1888), 124 U. S., 190.